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IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and STATE FARM FIRE AND CASUALTY COMPANY,

Petitioners,

v.

JULIE WILLES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals erred in interpreting key statutory terms in the definition of "adverse action" in the Fair Credit Reporting Act, 15 U.S.C. §1681a(k)(1)(B)(i), so as to expand the reach of that definition far beyond its plain meaning, thus substantially increasing the statutory obligations on insurance companies to notify consumers of purported "adverse actions" and creating vastly expanded potential liabilities under the statute?

2. Whether the Ninth Circuit Court of Appeals erred in holding that "willful noncompliance" under section 1681n of the Fair Credit Reporting Act, 15 U.S.C. § 1681n, encompasses "reckless disregard" for the requirements of the Act, a holding that directly conflicts with the holdings of other Courts of Appeals, which have required knowledge that the conduct at issue did not comply with the Act?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner State Farm Mutual Automobile Insurance Company is a mutual insurance company and does not issue stock. It has no parent company.

Petitioner State Farm Fire and Casualty Company is a wholly-owned subsidiary of Petitioner State Farm Mutual Automobile Insurance Company.

Respondent Julie Willes is an individual.

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Petitioners State Farm Mutual Automobile Insurance Company ("State Farm Mutual") and State Farm Fire and Casualty Company ("State Farm Fire") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinions of the United States District Court for the District of Oregon (Pet. App. 60-76) have not been officially reported. The opinion of the United States Court of Appeals in this case (Pet. App. 23-24), which has not been selected for publication in the Federal Reporter, is available in the Federal Appendix, 143 Fed. App'x. 64. The consolidated opinion of the Court of Appeals in *Edo v. GEICO Casualty Co.* and *Reynolds v. Hartford Financial Services Group, Inc.* (Pet. App. 25-57), which is incorporated into the Court's opinion in this case, is reported at 435 F.3d 1081.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 4, 2005. State Farm Mutual and State Farm Fire's timely petition for rehearing and rehearing en banc was denied on April 20, 2006. (Pet. App. 58-59). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1681a, 1681b, 1681n, and 1681o of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681a, 1681b, 1681n, 1681o, are reproduced at Pet. App. 1-22.

STATEMENT OF THE CASE

Background

The FCRA is intended to ensure the accuracy and fairness of consumer credit reporting through regulation of both consumer reporting agencies and users of consumer reports, including insurance companies. 15 U.S.C. §§ 1681(a), (b). The FCRA permits insurance companies to obtain consumer

credit information for use in connection with the underwriting of insurance. 15 U.S.C. §1681b(a)(3)(C). If, however, an insurance company takes an "adverse action," as defined in the statute, based upon information in a consumer report, the company is required to notify the consumer of the adverse action. 15 U.S.C. §1681m. In the context of insurance, an "adverse action" is defined as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance." 15 U.S.C. §1681a(k)(1)(B)(i).

This case is one of eight class action lawsuits filed against automobile, homeowners, and other insurance companies in the United States District Court for the District of Oregon. Each lawsuit alleges that the insurance company defendant "willfully" violated the FCRA in transactions with the named plaintiffs and putative class members nationwide, by failing to provide notice of "adverse actions" allegedly taken by the companies based upon their credit histories. The lawsuits seek statutory damages of $100 to $1000 for each putative class member, punitive damages and attorneys' fees.

Plaintiff Julie Willes' action against Petitioners State Farm Fire and State Farm Mutual arose from Ms. Willes' visit on August 1, 2001 to a local State Farm insurance agency to obtain a quote for automobile insurance. During that visit, Ms. Willes was offered a quote for automobile insurance from State Farm Fire. Ms. Willes applied for State Farm Fire insurance for her three cars.

The insurance agent had a preliminary conversation with Ms. Willes in which the agent obtained from Ms. Willes the basic background information needed to prepare a quote, including Ms. Willes' driving history.[1] Ms. Willes informed

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[1] State Farm insurance agents prepare quotes using a computerized system called "Echo Quote." As a preliminary step, the agent must decide whether to prepare a quote for insurance with State Farm Mutual or to prepare a quote for insurance with State Farm Fire. Both the agent's decision as to which company to choose and the initial quote itself are based upon information learned from the driver in a preliminary oral

the agent that she had received a speeding ticket within the past thirty-six months.

State Farm Mutual and State Farm Fire are separate insurance companies that each offer automobile insurance policies at potentially different rates. Each company has its own threshold eligibility requirements. Among State Farm Mutual's threshold requirements is that the driver have no accidents or moving violations within the prior thirty-six months. Although some of these eligibility requirements can be waived by State Farm Mutual, an individual who fails to meet such requirements is presumptively ineligible for coverage from State Farm Mutual.

Based on Ms. Willes' revelation that she had received a speeding ticket within the prior thirty-six months, the insurance agent prepared a quote for insurance from State Farm Fire, not State Farm Mutual. No quote for State Farm Mutual insurance was ever prepared for Ms. Willes. Ms. Willes directed the insurance agent to prepare applications for the quoted State Farm Fire insurance for each of her three cars. Ms. Willes signed the three applications, and the applications were submitted for underwriting.

Not until after the quote had been given to Ms. Willes and she had directed the agent to prepare the insurance applications was any information from a credit or consumer report accessed. At that time, as part of the application process for the State Farm Fire insurance, State Farm's on-line automated underwriting information or "AUI" system generated an "underwriting score" for Ms. Willes. That underwriting score was based in part upon Ms. Willes' driving record and insurance claims history and in part upon her credit history and other pertinent information. If Ms. Willes' underwriting score had been sufficiently high, Ms. Willes might have qualified for an exception to State Farm Mutual's threshold eligibility requirements despite her

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conversation. Neither is based on the consumer's credit information or on any consumer report as defined by the FCRA. Thus, under State Farm's procedures, the decision as to which company's insurance a consumer is eligible for is made prior to the submission of an application for insurance and prior to the use of any credit information.

speeding ticket, and might have been offered policies with State Farm Mutual. Her score was not sufficiently favorable to qualify for the exception. Ms. Willes' applications with State Farm Fire were approved, and insurance policies were issued at the rates that had been quoted to her without reference to any credit information or other consumer report.

Ms. Willes brought suit against both State Farm Fire and State Farm Mutual, asserting that both of the two companies had willfully violated the FCRA by failing to notify her of a purported "adverse action," namely, that she was not offered a State Farm Mutual policy, due in part, she claims, to information contained in her credit report. Ms. Willes' Complaint seeks recovery on behalf of herself and a putative nationwide class.

The District Court's Grant of Summary Judgment in Favor of State Farm Fire and State Farm Mutual

The District Court (Anna J. Brown, J.) granted summary judgments in favor of both State Farm Fire and State Farm Mutual, holding that neither company had taken an adverse action within the meaning of the FCRA and that therefore neither company was required by the statute to provide notice to Ms. Willes. In the case of State Farm Fire, the District Court concluded that an "insurer cannot 'reduce' or 'unfavorably or adversely change' the terms of insurance unless such terms previously existed and the insurer subsequently altered those terms in an unfavorable manner." Pet. App. 62. Accordingly, the court ruled that State Farm Fire's "initial setting of [Ms. Willes'] insurance premiums did not constitute 'adverse actions' under FCRA." Pet. App. 63. The District Court acknowledged that the initial setting of Ms. Willes' State Farm Fire premium was not based upon her credit information. Pet. App. 62-63.

The District Court rejected Ms. Willes' assertion that "she applied for and was denied an automobile insurance policy with [State Farm] Mutual because of information relating to her credit history contained in a consumer credit report." Pet. App. 72-73. Because the FCRA defines an adverse action in the insurance context as an action adversely affecting the consumer with regard to "insurance, existing or applied for,"

15 U.S.C. § 1681a(k)(1)(B)(i), the court reasoned that the threshold issue presented by Ms. Willes' claims against State Farm Mutual was "whether Willes applied for automobile insurance with Mutual." Pet. App. 73. The court explained that "Willes characterizes the application process as one in which the agent 'submitted her [qualifying] information to the [State Farm automated underwriting system] . . . to determine whether plaintiff should be written in State Farm Mutual or State Farm Fire'" and that on that basis Ms. Willes claimed that an "'application was made to both companies.'" Pet. App. 74. Rejecting Ms. Willes' contentions, the District Court found that Ms. Willes

> made only one application for insurance, and that application was directed to Fire & Casualty. The State Farm agent who Willes contacted made the initial determination, without regard to credit history, that Willes did not qualify for the Mutual policy because of her driving record. The agent submitted a request for a quote to Fire & Casualty only. Fire & Casualty responded with a quote. Willes then submitted applications on each of her automobiles to Fire & Casualty. Mutual, via the AUI [Automated Underwriting] system, could have created an exception to Mutual's underwriting guidelines during the pre-application process depending on Willes's credit score. At the time the AUI system indicated Mutual would not make an exception in Willes's case, however, Willes had not requested insurance with Mutual and the State Farm agent had requested a quote from Fire & Casualty only.

Pet. App. 74. Thus, the District Court rejected Ms. Willes' contention that she had "applied for" insurance with State Farm Mutual, noting that "Willes' hope to obtain the best coverage available is too generic to be an 'application' for insurance with Mutual." Pet. App. 75. The District Court did not reach the issue of willfulness with respect to either State Farm Fire or State Farm Mutual.

The Ninth Circuit's Decision in Willes

The Ninth Circuit reversed the District Court's grants of summary judgment in favor of State Farm Fire and State Farm Mutual based upon its consolidated decision in two related cases, *Edo v. GEICO Casualty Co.* and *Reynolds v. Hartford Financial Services Group* (hereinafter, "*Reynolds*"). In light of *Reynolds*, which was issued on the same day as and incorporated into its decision in this case, the Ninth Circuit rejected the District Court's ruling with regard to State Farm Fire that in cases involving an initial policy of insurance, an "'increase[] in any charge' cannot occur 'unless the insurer makes an initial demand for payment to the insured and subsequently increases the amount of that demand based on information in the insured's credit report.'" Pet. App. 24. With regard to State Farm Mutual, the Ninth Circuit stated:

> [T]he district court reasoned that although State Farm Mutual Automobile Insurance Company denied Willes a policy based on his [*sic*] credit information and made the decision that he [*sic*] would be charged an increased rate, Mutual was not liable because Willes "did not apply for and was not denied insurance coverage by Mutual within the meaning of FCRA." Again, we reverse, in light of [*Reynolds*].

Pet. App. 24. The court, not reaching the issue of willfulness, "remand[ed] these and all remaining issues to the district court for consideration in light of [*Reynolds*]." Pet. App. 24.

State Farm Fire and State Farm Mutual filed three petitions and amended petitions for rehearing and for rehearing en banc, which were denied by the Ninth Circuit on April 20, 2006. Pet. App. 58-59.

The Ninth Circuit's Consolidated Decision in Reynolds

As noted above, the Ninth Circuit's decision in *Willes* was issued on the same day as and incorporated the holdings of the Ninth Circuit's consolidated decision in *Reynolds*.[2] Three

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[2] The Ninth Circuit issued its original opinion in *Reynolds* on August 4, 2005, but subsequently amended that decision twice. *See* 416 F.3d 1097

other cases against other insurance companies, all originating in the Oregon District Court, were decided on the same day as *Willes*, and the consolidated opinion in *Reynolds* formed the basis of the Ninth Circuit's reversals of summary judgment in those cases as well.

In *Reynolds*, the Ninth Circuit adopted a broad reading of the FCRA's statutory definition of an adverse action in connection with the underwriting of insurance. The court held that in the insurance context an adverse action in the form of a price increase occurs "whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged." Pet. App. 42. Furthermore, the court held that there is an increase within the meaning of the statute "whenever a consumer pays a higher rate because his credit rating is less than the top potential score." Pet. App. 43. The court stated that, "[i]n other words, if the consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable, an adverse action has been taken against him." Pet. App. 43-44.[3]

In addition, the Ninth Circuit rejected the contention that the FCRA's use of the term "insurance . . . applied for" limited the statute to circumstances where a consumer actually submitted an application for insurance. Instead, the Ninth Circuit held that making a general request for insurance constituted applying for insurance within the meaning of the FCRA. Pet. App. 48-49. Based upon its broad interpretation of "applied for," the Ninth Circuit also held that an adverse action occurs where a consumer applies for insurance with a family of companies and is offered insurance with one of the companies at less than the best price offered by any of the companies and that in such

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(9th Cir.), *superseded by* 426 F.3d 1020 (9th Cir. 2005), *superseded by* 435 F.3d 1081 (9th Cir. 2006). References herein to *Reynolds* are to the Ninth Circuit's 2006 opinion, unless otherwise specified. The 2006 opinion is reproduced at Pet. App. 25-57.

[3] As noted above, credit information is only one component of the information used to generate the "underwriting score" at issue in this case. *See supra* at 3.

circumstances two or more companies may be jointly and severally liable. Pet. App. 43-44, 48-51.

Addressing civil liability for willful noncompliance with the FCRA, the Ninth Circuit followed the Third Circuit in holding that willful noncompliance with the requirements of the Act includes not only a knowing and intentional failure to comply, but also "reckless disregard" of the rights of consumers under the FCRA. The Ninth Circuit acknowledged that the willfulness standard it adopted conflicts with the standard adopted by other Circuits, including the Sixth and Eighth. Pet. App. 54 n.17. The Ninth Circuit further ruled that a company's reliance upon an "implausible" interpretation of the statute, even in matters of first impression and even with advice of counsel, could support a finding of willful noncompliance. Pet. App. 55.

Pursuant to these rulings, the Ninth Circuit found that State Farm Fire and State Farm Mutual could both be liable to Ms. Willes, despite the fact that State Farm Fire issued Ms. Willes insurance policies at the price it quoted to her without reference to any consumer report and despite the fact that consideration of Ms. Willes' underwriting score did not result in any change in the initial determination that Ms. Willes was not eligible for a State Farm Mutual policy.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decisions drastically expand the obligations and potential liability imposed upon insurance companies and other businesses under the FCRA. The court's interpretation of the FCRA's definition of "adverse action" directly contravenes the plain language of the statute and raises important questions of statutory construction that should be resolved by this Court. In addition, for purposes of the civil penalties provisions of the FCRA, the Ninth Circuit erroneously interpreted "willful" noncompliance with the requirements of the statute as including reckless disregard – an interpretation rejected by the Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits. Because a finding of "willful" non-compliance with the statute permits the award of statutory damages, punitive damages and attorney's fees, the Ninth Circuit's relaxation of the willfulness

standard, if allowed to stand, will improperly subject companies to enormous potential liability. The impact and importance of this issue and the conflict among the Courts of Appeals warrant this Court's intervention.

Under the FCRA, it is a permissible practice for insurance companies to consider a consumer's credit history or other consumer information in making underwriting decisions as to whether to insure a particular risk and at what price. *See* 15 U.S.C. § 1681b(a)(3)(C). However, an insurer who takes an "adverse action" as defined by the FCRA is obliged to notify the affected consumer. The statutory definition of "adverse action" limits the FCRA's notice requirements to unfavorable actions taken with regard to insurance that is "existing" or "applied for." Under the Ninth Circuit's ruling, "applied for" includes an ill defined range of actions connected to a consumer's request for information regarding policies available and the prices of coverage. Thus, for example, under the Ninth Circuit's interpretation of the words "applied for," a consumer who submits an application for insurance to a particular company of an affiliated group of companies may be deemed to have "applied for" insurance with the other companies in the affiliated group. The supposedly "applied for" insurance is then deemed to have been denied, and if that insurance would or might have been less expensive than the insurance the consumer actually applied for, an "increase" in the charge for the consumer's insurance is deemed to have occurred, triggering an obligation to give notice. The Ninth Circuit's interpretation is contrary to the ordinary and natural meaning of the words "applied for" in the context of insurance.

The drastic expansion of the notice obligation resulting from the Ninth Circuit's interpretation of the words "applied for" is illustrated by its reversal of summary judgment in favor of State Farm Mutual. When Plaintiff first inquired about State Farm insurance, the agent determined that, based on information about her driving record which Plaintiff herself supplied, Plaintiff was not eligible for State Farm Mutual insurance and provided Plaintiff with quotes for State Farm Fire policies. Plaintiff signed and submitted three applications for State Farm Fire insurance. In the application

process, when Plaintiff's underwriting score (based partly on her credit history) was accessed, it was again determined that Plaintiff was not eligible to apply for a State Farm Mutual policy. Plaintiff never asked for State Farm Mutual insurance, was never quoted a price for State Farm Mutual insurance and did not submit applications for State Farm Mutual insurance. Yet, according to the Ninth Circuit's interpretation of the statutory definition of "adverse action," Plaintiff "applied for" State Farm Mutual insurance and was "denied" based upon her credit history.

The Ninth Circuit also erred in holding that the phrase "increase in any charge for" encompasses any initial purchase of insurance where a consumer is charged a rate that is more than the rate he or she would have paid if his or her credit score had been perfect. In the present case, the Ninth Circuit simply disregarded the fact that Plaintiff's premium was initially determined *without* reference to any consumer report and was not subsequently raised. The Ninth Circuit held that both State Farm Fire and State Farm Mutual could be liable based upon the purported increase in the premium that might hypothetically have been available if Plaintiff had been eligible to apply for State Farm Mutual insurance. The Ninth Circuit likewise disregarded the crucial fact that the initial determination that Plaintiff was not eligible for State Farm Mutual insurance was also made *without* consideration of any consumer report and that Plaintiff's underwriting score was merely used to confirm that initial determination. Thus, even though State Farm Mutual did not provide Plaintiff with insurance at all, the Ninth Circuit held that State Farm Mutual had somehow "made the decision that [Ms. Willes] would be charged at an increased rate" based on her credit history. Pet. App. 24.[4]

Neither the hypothetical "perfect credit" standard nor the use of rates offered by affiliated companies to determine

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[4] Notably, although State Farm Mutual generally offers auto insurance at a lower premium charge than State Farm Fire, Plaintiff offered no evidence as to what premium she would have been charged by State Farm Mutual, nor did she offer any evidence that State Farm Mutual or State Farm Fire would have offered her a better rate even if her credit history had been better than it was.

whether an increase has occurred are found anywhere in the language of the FCRA. The district court's common sense holding that an "increase in any charge" for insurance cannot occur "unless the insurer makes an initial demand for payment to the insured and subsequently increases the amount of that demand based on information in the insured's credit report" (Pet. App. 62, 72) accords with the language of the statute and provides a bright line rule. Applying the statutory language to the facts presented by this case, it is evident that the proper benchmark for determining if there was an increase in the charge for Ms. Willes' insurance is the price quoted to her based upon the information she herself supplied at her interview with a State Farm agent. Because there was no subsequent increase from that initial demand, there was no "adverse action" under the FCRA. Certiorari is warranted to review and correct the Ninth Circuit's erroneous interpretation of the statutory definition of "adverse action."

In addition, this Court should grant certiorari to resolve the conflict between the Courts of Appeals regarding the meaning of "willful" under section 1681n(a) of the FCRA. The Ninth Circuit erroneously held that willful noncompliance with the Act encompasses not only a knowing and intentional failure to comply, but also "reckless disregard." Pet. App. 53. Although the Ninth Circuit's position has been adopted by the Third Circuit, it has been rejected by the Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, which properly require *conscious* disregard of the statutory requirements and/or knowledge that the conduct unlawfully impinges on the rights of consumers under the FCRA.

The Ninth Circuit incorrectly interpreted this Court's decisions as establishing a rule that the word "willful" when used in civil statutes means reckless, while in criminal statutes the meaning is limited to knowing, intentional conduct. Pet. App. 53-54. The existence of such a rule is contradicted by decisions such as *Kawaahau v. Geiger*, 523 U.S. 57, 61 (1998), in which this Court held that "willful" as used in section 523(a)(6) of the Bankruptcy Code did not include the meaning "reckless," noting that if Congress had

intended that meaning, it could have added the word "reckless" to the statute.

This Court has repeatedly stated that the meaning of the term "willful," whether in civil or criminal statutes, may vary depending on the particular statutory context in which it is used and that determination of its meaning should be based on a careful analysis of the statutory language. Such an analysis – which the Ninth Circuit failed to perform – demonstrates that the term "willful" as used in the FCRA was intended to encompass only knowing, intentional conduct committed with knowledge that the conduct impinged on the rights of consumers under the Act. In particular, in the hierarchy of violations and civil penalties created by the Act (willful noncompliance, knowing noncompliance, and negligent noncompliance), only willful noncompliance carries the possibility of punitive damages. As such, it was error for the Ninth Circuit to interpret "willful" as occupying an intermediate level of culpability – recklessness – between knowing and negligent. The Ninth Circuit's incorrect interpretation of "willful" improperly creates a massive expansion of liability for punitive and compensatory damages under the FCRA and directly conflicts with the decisions of other Courts of Appeals.

For these reasons and those set forth below, Petitioners respectfully submit that this Court should grant certiorari.

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW AND CORRECT THE NINTH CIRCUIT'S ERRONEOUS INTERPRETATION OF THE STATUTORY DEFINITION OF "ADVERSE ACTION" UNDER THE FCRA

In its decisions below, the Ninth Circuit disregarded the ordinary and natural meanings of key terms in the FCRA's definition of "adverse action," thereby vastly expanding the potential notice obligations imposed upon insurance companies far beyond what the plain words of the statute authorize. This Court should grant certiorari to review and correct the Ninth Circuit's erroneous interpretation of this important federal statute.

A. Under the FCRA, a Consumer Who Has Done Nothing More Than Informally Request Quote Information Has Not "Applied For" Insurance

In reversing the District Court's decisions below, the Ninth Circuit rejected the District Court's ruling that Ms. Willes "'did not apply for and was not denied insurance coverage by Mutual within the meaning of FCRA,'" Pet. App. 75, despite the fact that Ms. Willes was quoted only State Farm Fire insurance and signed and submitted insurance applications specifically directed to State Farm Fire. Under the Ninth Circuit's decision, Ms. Willes' general request for information about insurance and "hope to obtain the best coverage available" (Pet. App. 75) somehow constituted an application for insurance with State Farm Mutual. The Ninth Circuit's ruling impermissibly distorts the meaning of the words "applied for" in the context of insurance.

The term "applied for" is not defined in the statute. "[S]ince it is neither defined nor a term of art, it should be construed 'in accordance with its ordinary or natural meaning'" *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 126 S. Ct. 1843, 1844 (2006) (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)); *see also BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 184 (2004) ("'[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning'") (quoting *Perrin v. United States*, 333 U.S. 37, 42 (1979)). In addition, the context in which a word is used further defines and limits its possible range of meanings. *See Dolan v. U.S. Postal Service*, 126 S. Ct. 1252, 1253-54 (2006) (statutory interpretation of word or phrase is limited by context); *Doe v. Chao*, 540 U.S. 614, 630 (2004) (words of a statute must be read in context).

The "ordinary or natural meaning" of the words "applied for" does not encompass an informal, oral request for information about insurance policies and prices. *See, e.g.*, *Black's Law Dictionary* (6th ed. 1990) (defining "apply" as "[t]o make a formal request or petition, usually in writing, to a court, officer, board, or company, for the granting of some favor, or of some rule or order, which is within his or their power or discretion. For example, to apply for an injunction,

for a pardon, *for a policy of insurance*, or for a receiver.") (emphasis added); *Cambridge Advanced Learner's Dictionary* (2006), available at http://dictionary.cambridge.org/define.asp?key=3588&dict=CALD ("to request something, usually officially, especially by writing or sending in a form"); *Merriam Webster's Collegiate Dictionary* 57 (10th ed. 1994) ("to make an appeal or request esp. in the form of a written application").

The words "applied for" ordinarily and naturally describe a formal submission by a person seeking acceptance or approval for something – for a new job, for a loan, for admission to a law school, or, as here, for insurance coverage. The words "applied for" do *not* ordinarily and naturally describe informal oral requests to a prospective employer for salary information, to a bank for potential interest rates and terms, or to a law school for tuition and curriculum information. Nor do those words ordinarily and naturally describe an informal request to an insurance company for quote information.[5] Significantly, Petitioners have found no instance in any other section of the United States Code where the words "apply for insurance" or "application for insurance" have the broad meaning attributed to them by the Ninth Circuit here. To the contrary, in each such instance it is clear that the words refer to a written application for

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[5] Petitioners submit that the plain meaning of "insurance . . . applied for" is insurance for which the consumer has submitted an application; resort to the legislative history of section 1681a(k)(1)(B)(i) is, therefore, unnecessary. The legislative history of this subparagraph does not in any event support the broad interpretation of "applied for" adopted by the Ninth Circuit. The only relevant passage in the legislative history states:

> Under Section 603(k), "adverse action". . . includes a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or any amount of, any insurance, in connection with the underwriting of insurance. This portion of the definition applies to adverse determinations with respect to existing insurance or *applications for new insurance.*

Economic Growth and Regulatory Paper Reduction Act of 1995, S. Rep. No. 104-185, at 32 (1995) (emphasis added). The use of the phrase "applications for new insurance" confirms that the statutory words "applied for" refer to formal applications for insurance.

insurance capable of being submitted, filed, processed, and reviewed.[6]

The Ninth Circuit attempted to justify its interpretation of the words "applied for" by asserting that an interpretation of "applied for" as limiting liability to the company that actually issued the insurance policy would eliminate all potential FCRA liability for denials of insurance. Pet. App. 48-49. To the contrary, there can be no question that a company which has denied a formal application for insurance based upon a consumer report has taken an adverse action, even though it has not "issued" a policy. The real question is whether the words "applied for" limit the definition of adverse action to situations where the insurance company has received and acted upon an application for insurance. The words "denial" of insurance "applied for" do not include a decision to quote insurance prices for a particular company among a group of companies and not other companies. Contrary to the interpretation of the Ninth Circuit (Pet. App 41, 48-49), the phrase "insurance existing or applied for" must be understood to limit the scope of the definition of adverse action, not to expand it.[7]

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[6] *See, e.g.*, 38 U.S.C. § 1922 (applications for disabled veterans insurance); 30 U.S.C. § 1522 (d), (e) (applications for insurance for investments in geothermal resources); 20 U.S.C. § 1079 (a), (b) (applications for education loan insurance). The submission of a written application for insurance is a virtually universal step in the formation of a consumer insurance contract. *See, e.g.*, 1A Lee R. Russ et al., *Couch on Insurance* §§ 11:1, 11:3 (3d ed. 2005) (a blank application is generally insurer's proposal or invitation to make an offer to contract; submission of the completed application by the consumer is an offer to contract, which the insurer may accept or decline after investigating the applicant).

[7] Significantly, the statute's definition of permissible uses of consumer information in insurance underwriting is not restricted to insurance that is existing or applied for. *Compare* 15 U.S.C. § 1681b(a)(3)(C) (permissible purposes of consumer reports include "use [of] the information in connection with the underwriting of insurance involving the consumer") *with* 15 U.S.C. § 1681a(k)(1)(B)(i) (adverse action includes a "denial or cancellation of, an increase in the charge for . . . any insurance, existing or applied for, in connection with the underwriting of insurance"). The contrast between the two provisions shows that the

The present case illustrates just how far the FCRA notice requirements have been expanded by the Ninth Circuit's interpretation of the words "applied for." The court's decision was premised upon the finding that Ms. Willes had "applied for" insurance with State Farm Mutual. But by Plaintiff's own admission, she contacted State Farm only "to obtain a quote for automobile insurance," "seeking the best policy" available. She had an initial oral conversation with a State Farm agent, but submitted to State Farm Mutual no form, no document, nor any other submission that would ordinarily or naturally be described as an "application." Indeed, Ms. Willes never even received a quote from State Farm Mutual.

Ms. Willes did "apply for" insurance with State Farm Fire. After Ms. Willes requested and received a quote from State Farm Fire, she made a decision to apply for the quoted insurance. She was then presented with printed documents entitled "Application for State Farm Fire and Casualty Insurance." Ms. Willes reviewed those applications and signed her name to three identical affirmations, stating that she applied for the insurance indicated and had read this application.

Thus, there is no doubt that Ms. Willes "applied for" insurance with State Farm Fire. The undisputed evidence of her formal applications specifically addressed to State Farm Fire should not be disregarded based on the Ninth Circuit's erroneous interpretation of an informal request for information about State Farm auto insurance in general as falling within the "ordinary or natural meaning" of the statutory words "insurance existing or applied for." Ms. Willes did not apply for a policy with State Farm Mutual.

A consumer's informal requests for insurance quotes with nothing more than the intent to gather information to make a later decision whether to apply for insurance should not subject each affiliated insurance company represented by the agent to FCRA notice obligations and the attendant legal liabilities. Significantly, although the Ninth Circuit opines

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addition of the phrase "insurance, existing or applied for" was meant to limit the definition of adverse action. Contrary to the Ninth Circuit, the phrase was not meant to remove any "temporal limitation." Pet. App. 41.

that its expansive interpretation furthers the objectives of FCRA, the language at issue was added to FCRA as part of the Economic Growth and Regulatory Paperwork Reduction Act of 1995. That Bill, which amended a number of statutes, including FCRA, had a general objective of removing "unnecessary regulatory compliance requirements" in a manner consistent with consumer protection and other public policy goals. *See* S. Rep. No. 104-185, at 3, *supra* note 5.

Petitioners respectfully submit that this Court should grant certiorari to review and correct the Ninth Circuit's manifestly erroneous construction of the statutory language "insurance existing or applied for."

B. Under the FCRA, a Consumer Seeking an Initial Insurance Policy Who Is Not Offered the Very Best Rate Due to His or Her Credit Information Has Not Suffered a Rate "Increase"

The Ninth Circuit held that the phrase "an increase in any charge" in the definition of "adverse action" includes the situation where a new customer is billed an initial rate higher than that which she would have been billed – by the company at issue *or* any affiliated company – if her credit had been perfect. *See* Pet. App. 24, 43-44, 48-51. This broad interpretation severely distorts the meaning of the statutory language.

There is no dispute that, as the Ninth Circuit observed, "[i]ncrease means to make something greater." Pet. App. 40. The question is, greater compared to what? Applying the statutory language to the facts of the present case, it is clear that the Ninth Circuit's construction of the statute to hold that there is an increase whenever the charge is greater than the best possible rate available to consumers with the best possible credit rating is profoundly erroneous. Here, it is undisputed that Ms. Willes was quoted a premium based solely on information she herself provided as to her driving record. The subsequent check of her underwriting score did not result in an increase to the quoted premium. The Ninth Circuit's reasoning that the charge for her insurance was nevertheless increased because it was greater than a rate that

might hypothetically have been available from State Farm Mutual, an affiliated, but separate company, if her credit score had been perfect does violence to the ordinary and natural meaning of the words in the statute. As the district court correctly held, there was no "increase" in this case, because State Farm Fire, after making its "initial demand" for payment, did not subsequently increase the amount of that demand based on information in the insured's credit report. Pet. App. 62, 72.[8]

Of course, it would be possible that, in processing an application for insurance, a company could determine based on an applicant's credit history and other information that the premium charge should be higher than the initial quote. In such a circumstance, there may be an adverse action within the meaning of the statute. However, there is no support in the words of the statute for the Ninth Circuit's holding that the FCRA "requires [an adverse action] notice[] whenever a consumer pays a higher rate because his credit rating is less than the top potential score." Pet. App. 43. The Ninth Circuit's holding improperly expands the statute to cover factual circumstances such as in the present case where use of credit information incorporated into an underwriting score merely failed to *reduce* the premium quoted. The statute by its plain terms applies only to *increases* based on information in a consumer report.

The "perfect credit" benchmark invented by the Ninth Circuit is found nowhere in the language of the statute. Use of the benchmark would lead to the untenable result, certainly unintended by Congress, that virtually every

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[8] In *Reynolds* and *Edo*, the consumers in question (unlike Ms. Willes) were not actually provided with a quote based solely on the consumer's own answers about their driving history. However, in determining its statutory obligations, Geico used as a baseline the charge that would have applied if a premium rate had been determined and quoted to the plaintiff without reference to his credit information. Pet. App. 43. In *Reynolds*, the only credit information that the Hartford Companies were able to obtain with regard to the plaintiff in that case was that there was no credit information or insufficient credit information upon which to base a credit report. Pet. App. 45. Neither insurer raised the premium initially imposed. Pet App. 43-45.

purchaser of insurance would be required to receive a FCRA notice. *See Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (statutes should not be read to produce absurd and untenable results). The "ordinary or natural" reading of "an increase in any charge" implies a simple and logical benchmark, *i.e.*, the price that was actually quoted (or would have been quoted) to the consumer without reference to credit information.[9]

The Ninth Circuit used its erroneous interpretations of "applied for" and "increase in any charge" to extend the reach of the statute beyond the company to which a consumer actually "applies for" insurance to affiliated companies that did not offer insurance to the consumer. Contrary to the Ninth Circuit, the plain meaning of the statutory definition of adverse action is not elastic enough to include a determination by an affiliated company not to waive its threshold eligibility requirement that the consumer not have a speeding ticket within the past 36 months. Indeed, at the same time Congress added to the FCRA the definition of adverse action at issue, it made plain that insurance companies and credit companies may permissibly make offers to consumers prescreened on the basis of their credit information, without triggering notice obligations to consumers who do not receive the offer. *See* S. Rep. No.

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[9] Significantly, Congress knows how to draft statutory language describing an action based on an unfavorable rate, even though there has been no "increase in any charge." Thus, in 2003, Congress enacted 15 U.S.C. § 1681m(h), as part of the Fair and Accurate Credit Transactions Act, Pub. L. No. 108-159, Tit. III, § 311(a). Section 1681m(h)(1) requires notice when "any person uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit *on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person*, based in whole or in part on a consumer report." 15 U.S.C. § 1681m(h)(1) (emphasis added). Section 1681m(h)(1) also demonstrates that, contrary to the Ninth Circuit, Congress has not made a policy determination to require notice to every one who receives less than the most favorable terms, but only to those who receive terms less favorable than the most favorable terms available to a substantial proportion of consumers.

104-185, at 32-33, *supra* note 5 (discussing 15 U.S.C. § 1681b(c)(B)(i) & 1681a(l);"failure to include a consumer in a prescreening solicitation does not constitute adverse action"). The same amendments also made clear that a company may use consumer reports to review the accounts of existing customers, and that there is no adverse action if a consumer's account is not changed, even if the accounts of other consumers are changed in a favorable manner. *See id.* (discussing 15 U.S.C. 1681a(m)). Thus, the provisions that accompanied Congress's enactment of the definition of "adverse action" in the insurance context are incompatible with the Ninth Circuit's broad interpretation of that definition.

Ms. Willes' own situation demonstrates the extraordinary results created by the Ninth Circuit's interpretation. Ms. Willes was quoted a price for insurance from State Farm Fire. Once she decided to apply for that insurance and was approved, she was charged the quoted premium. Her complaint, however, is that she did not receive notice that she was not provided with a quote and an application form for insurance from a different company, State Farm Mutual. Contrary to the Ninth Circuit's decision, the fact that an affiliated company does not offer insurance to a consumer does not constitute a denial of insurance that has been applied for or an increase in the charge for insurance, by either the insuring company or the affiliate.

The Ninth Circuit's decisions in this case and the related FCRA cases before it raise important issues regarding the interpretation of a federal statute. The Ninth Circuit's erroneous rulings, if allowed to stand, will create vastly expanded, costly and burdensome notice obligations under the FCRA. Review by this Court is warranted.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE NINTH CIRCUIT'S INTERPRETATION OF THE TERM "WILLFUL" IN SECTION 1681n OF THE FCRA AND THE INTERPRETATION OF THE SECOND, FOURTH, FIFTH, SEVENTH AND EIGHTH CIRCUITS

A. The Ninth Circuit's Interpretation of the Statutory Term "Willful" Directly Conflicts with Decisions of Other Circuits

This Court should grant certiorari to resolve the conflict between the Courts of Appeals as to the standard for willfulness under 15 U.S.C. § 1681n(a) of the FCRA. Section 1681n(a) provides for enhanced damages, including punitive damages and attorneys fees, for a "willful" failure to comply with the requirements of the FCRA. In *Reynolds*, the Ninth Circuit followed the Third Circuit in ruling that "willfulness" under the FCRA encompasses not only a knowing and intentional failure to comply, but also "reckless disregard." *See* Pet. App. 53-55 (following *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997)). As the Ninth Circuit acknowledged, its decision directly conflicts with the decisions of other Circuits, including the Sixth and the Eighth, that have held that "willful noncompliance" requires a knowing and intentional act that the defendant knows to be in violation of the requirements of the statute. *See* Pet. App. 54 n.17 (citing *Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002) ("[W]illful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law"), and *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998) (an actual belief of legality suffices to defeat willfulness liability under the FCRA)).

Likewise, contrary to the Ninth Circuit, the Second, Fourth, Fifth, and Seventh Circuits have adopted a narrower definition of willfulness, requiring a knowing and intentional failure to comply with the FCRA, with knowledge of illegality or *conscious* disregard for the rights of the consumer. *See Casella v. Equifax Credit Info. Servs.*, 56

F.3d 469, 476 (2d Cir. 1995) (affirming summary judgment in favor of defendant where defendant's "course of conduct d[id] not support the kind of 'conscious disregard' or 'deliberate and purposeful' actions necessary to make out a claim for willful noncompliance under the FCRA"); *Dalton v. Capital Assoc'd Indus. Inc.*, 257 F.3d 409, 418 (4th Cir. 2001) ("willfulness" under the FCRA requires that the defendant "'knowingly and intentionally committed an act in conscious disregard for the rights'" of the consumer) (citation omitted); *Stevenson v. TRW Inc.*, 987 F.2d 288, 293 (5th Cir. 1993) ("To be found in willful noncompliance, a defendant must have knowingly and intentionally committed an act in conscious disregard for the rights of others."); *Wantz v. Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004) ("To act willfully, a defendant must knowingly and intentionally violate the Act, and it 'must also be conscious that [its] act impinges on the rights of others.'") (citation omitted).[10]

This conflict between the differing legal standards adopted by the Courts of Appeals warrants immediate resolution by this Court. The issue is of major importance not only to insurance companies, but also to other companies and businesses that are subject to the FCRA. Resolution of this issue now will crucially affect the course of further litigation in this case, in *Reynolds*, and in the other cases directly made subject to the Ninth Circuit's decision in *Reynolds*. Review now by this Court of the Ninth Circuit's decision will avoid protracted litigation in these putative class actions under an erroneous interpretation of the statutory standard. Moreover, guidance on this issue (and the other issues in this case) will affect other FCRA certified and putative class actions pending outside the Ninth Circuit. *See, e.g., In re Farmers*

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[10] Although the Ninth Circuit asserts that "conscious disregard" is not necessarily conscious, but may also be "reckless," *see* Pet. App. 53, the other Circuits that have required "conscious disregard" for willful noncompliance have used the word "conscious" in the dictionary meaning of "knowing." *See, e.g., Wantz*, 386 F.3d at 834 (for willful noncompliance, a defendant must be "'conscious that [its] act impinges on the rights of others'"); *Stevenson*, 987 F.2d at 293 (requiring "conscious disregard").

Ins. Co., FCRA Litig., No. CIV-03-158-F, MDL 1564, 2006 WL 1042450, at *14 (W.D. Okla. Apr. 13, 2006) (granting class certification in FCRA case; citing *Reynolds*); *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04CV-4-M, 2005 U.S. Dist. LEXIS 20361, at *9-12 (W.D. Ky. Sept. 15, 2005) (citing *Reynolds*). Accordingly, considerations of judicial economy and efficiency weigh heavily in favor of a grant of certiorari by this Court to resolve this conflict now rather than at a later stage of these litigations.

B. The Ninth Circuit Clearly Erred in Its Interpretation of the Statutory Term "Willful"

The Ninth Circuit's holding that a willful failure to comply encompasses conduct that is reckless is based upon the incorrect contention that this Court's prior decisions establish the rule that the word "willful" as used in civil statutes has a meaning that includes reckless, while in criminal statutes the meaning of the word "willful" is limited to knowing, intentional conduct. *See* Pet. App. 53-54. Contrary to the Ninth Circuit's opinion, this Court in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), construed the word "willful" in a civil statute to mean "deliberate or intentional." In *Kawaahau*, this Court rejected the contention that "willful" included the meaning "reckless" for purposes of section 523(a)(6) of the Bankruptcy Code, holding that the words "willful injury" indicate "a deliberate or intentional injury." 523 U.S. at 61. In *Kawaauhau*, the Court noted that if Congress had intended a broader meaning, it "might have selected an additional word or words, *i.e.*, 'reckless' . . . to modify 'injury.'" *Id.*

Furthermore, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), cited by the Ninth Circuit, does not support the criminal/civil distinction drawn by the Ninth Circuit in interpreting the word "willful." In *Thurston*, far from adopting such a distinction, this Court's analysis of the meaning of the word "willful" under the Age Discrimination in Employment Act looked to prior decisions construing both civil and criminal statutes. *See id.* at 126-27. This Court's analysis in *Thurston* also relied extensively on the legislative history of the ADEA, which strongly suggested that

Congress intended the ADEA to apply to reckless conduct. *See id.* at 127-29; *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (recognizing that the *Thurston* "reckless disregard" standard was grounded in the legislative history of the ADEA). In contrast, the legislative history of the FCRA lends no support to the Ninth Circuit's interpretation of willfulness under section 1681n(a).

More importantly, the Ninth Circuit's ruling is antithetical to the principles of statutory construction established by this Court and to the careful contextual analysis that this Court has given to the meaning of the words "willful" and "willfully." As this Court has repeatedly recognized, the word "willful" is "'a word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan v. United States*, 524 U.S. 184, 191 (1998); *see also Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (same). Thus, in construing "willful," this Court has examined both the immediate context in which the word is used and "the complex of provisions in which [it] is embedded." *Ratzlaf*, 510 U.S. at 141. In particular, in determining the meaning of the word "willful," this Court has looked to the word or words that "willful" modifies. *See, e.g., Kawaauhau*, 523 U.S. at 61 ("The word 'willful' in [11 U.S.C. § 523] (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury."). Moreover, in conformity with the rule of statutory interpretation that a "term appearing in several places in a statutory text is generally read the same way each time it appears," this Court has recognized that the word "willful" should not be construed so malleably as to have an individuated interpretation each place it appears or with regard to the different terms, phrases or statutory sections to which it refers. *Ratzlaf*, 510 U.S. at 143.

Analysis of the statutory language and context demonstrates that "reckless" is not within the possible range of meanings of the word "willful" as used in section 1681a and elsewhere in the FCRA. Subsection (a) of section 1681n contains two different damages provisions for willful noncompliance with the requirements of the FCRA. *See* 15

U.S.C. § 1681n(a)(1)(A) & (B). Both of these damage provisions are prefaced by the same statutory language ("Any person who willfully fails to comply . . . ."). *See* 15 U.S.C. § 1681n(a). The first damages provision is generally applicable to any willful failure to comply with the requirements of the FCRA, *see* 15 U.S.C. § 1681n(a)(1)(A), while the second provision applies specifically "in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose," *see* 15 U.S.C. § 1681n(a)(1)(B).

Under the principles of statutory interpretation discussed above, the word "willful" in section 1681n(a) must be given a meaning that is compatible with both of the phrases to which it refers. The use of the word "willful" to modify the act of "obtaining a consumer report under false pretenses or knowingly without a permissible purpose" is incompatible with the meaning of "reckless" attributed to it by the Ninth Circuit. By its plain terms, a failure to comply with the statute as described in subsection (a)(1)(B) must be knowing and intentional. The words "knowingly without a permissible purpose" indicate that knowledge is required of what is or is not a permissible purpose under the FCRA.[11] Likewise, the words "under false pretenses" strongly indicate that knowingly and intentionally deceptive conduct is required. *Cf. Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) (statutory language making unlawful the use or employment of "any manipulative or deceptive device or contrivance" strongly suggests that the statute "was intended to proscribe knowing or intentional conduct"). Accordingly, the concept of recklessness is inconsistent with the statutory language "obtaining a consumer report under false pretenses or knowingly without a permissible purpose," and the words "willful" and "willfully" when used to describe such conduct must mean knowing, deliberate and intentional.

This Court's established principles of statutory interpretation require that "willful" in section 1681n(a) be given the same meaning that it has in reference to subsection

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[11] Section 1681b of the FCRA sets forth the permissible purposes for consumer reports.

(a)(1)(B) when it is taken in reference to other acts of noncompliance with the requirements of the statute under subsection (a)(1)(A). As noted above, when the word "willful" "appear[s] in several places in a statutory text," it is "generally read the same way each time it appears." *Ratzlaf*, 510 U.S. at 143 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992)).[12] Moreover, when, as here with the word "willful," a "*single* formulation" is "called into play" with regard to related provisions, there is "even stronger cause" to construe that formulation "the same way each time it is called into play." *See Ratzlaf*, 510 U.S. at 143. Accordingly, the meaning of "willful," as elucidated and limited by its use to describe a knowing violation of the statutory restrictions on obtaining consumer reports, applies also to its use to describe noncompliance in general with the statutory requirements. The word cannot mean "knowing and intentional" with regard to subsection (a)(1)(B) and "reckless" with regard to subsection (a)(1)(A).

In addition, section 1681n read as a whole confirms that "willful" as used in subsection (a) does not mean "reckless." Subsection 1681n(b) is headed "Civil liability for knowing noncompliance." Subsection (b) addresses precisely the same conduct addressed by subsection (a)(1)(B), namely, "obtain[ing] a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose," § 1681n(b), but provides for liability to a consumer reporting agency, not to consumers. Unlike subsection (a), subsection (b) does not require a "willful" violation and does not provide for punitive damages or attorney's fees. Subsection (b) and its heading confirm that obtaining a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose is by its plain terms "knowing noncompliance" with the FCRA. "Knowing noncompliance" by definition is not merely reckless. Accordingly, it is evident from the statutory scheme that under subsection (a),

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[12] *See also Clark v. Martinez*, 543 U.S. 371, 380 (2005) (statutory language given a limited construction in one context must be interpreted consistently in other contexts, even though other of the statute's applications, standing alone, would not support the same limitation).

"willfully" obtaining a consumer report under false pretenses or knowingly without a permissible purpose must require a greater level of culpability than "knowingly" committing the same violation under subsection (b).[13] Thus, section 1681n read as a whole is inconsistent with the Ninth Circuit's conclusion that subsection (a) should be interpreted to impose liability for the lesser degree of culpability represented by "reckless" noncompliance.

The FCRA's other penalty provisions, section 1681q and section 1681o, bolster the conclusion that "willful" does not mean "reckless" for purposes of section 1681n. Section 1681q provides criminal penalties for "knowingly and willfully obtain[ing] information on a consumer from a consumer reporting agency under false pretenses." 15 U.S.C. § 1681q. As in section 1681n, in this context too, the word "willfully" creates a standard that requires more than mere "knowing," not less. It clearly does not create liability for a reckless violation of the statute. Under the rule of statutory construction that a "term appearing in several places in a statutory text is generally read the same way each time it appears," *Ratzlaf*, 510 U.S. at 143, the word "willfully" should be given the same meaning in section 1681n that it has in section 1681q. Thus, section 1681q further confirms that, contrary to the Ninth Circuit's holding, "willful noncompliance" in section 1681n(a) does not refer to an intermediate level of culpability between negligence and knowing, but creates a higher standard for liability that requires an intentional and deliberate failure to comply with the requirements of the FCRA.[14]

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[13] An analogous example of Congress' understanding of the terms willfully and knowingly is provided by its amendment of the Endangered Species Act. *See* Endangered Species Act Amendments of 1978, H.R. Conf. Rep. No. 95-1804, *reprinted in* 1978 U.S.C.C.A.N. 9484, 9493 (amending penalty provisions of Endangered Species Act to "*reduce*[]" the standard from "willfully" to "knowingly" to facilitate enforcement and to make clear that knowledge of the law is not an element of a violation) (emphasis added).

[14] This construction of the word willful also accords with standard dictionary definitions. *See, e.g., Merriam Webster's Collegiate*

Section 1681o provides for civil liability for negligent noncompliance with the requirements of the FCRA. Unlike the civil liability created under section 1681n(a) and (b) for willful noncompliance and knowing noncompliance, section 1681o permits the recovery of "actual damages" only and does not impose an alternate minimum damages amount. *See* 15 U.S.C. § 1681o(a)(1). A comparison of the respective damages provisions of section 1681o (negligent noncompliance) and section 1681n(a) (willful noncompliance) and section 1681n(b) (knowing noncompliance) confirms that "willful noncompliance," which alone carries the possibility of punitive damages, represents the highest level of culpability under the statute, with the most severe sanctions. The Ninth Circuit's interpretation of the word "willful" to encompass "recklessness" erroneously makes "willful noncompliance" an intermediate level of culpability, inconsistent with the clear statutory hierarchy of violations.

C. The Ninth Circuit's Interpretation of "Willfulness" Relies Upon a Mistaken View of the Policies and Purposes of the FCRA

Rather than examine the statutory language in context, the Ninth Circuit relied upon its own belief as to what would be a "fair and balanced" and "practical" interpretation of the word "willful." Pet. App. 54. In concluding that a "reckless" standard would "best further the purposes and objectives of the Act," the Ninth Circuit improperly emphasized what it viewed as the need to ensure that section 1681n "d[id] not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression'" and to distinguish between such companies and companies who might "come to a tenable, albeit erroneous, interpretation of the statute." Pet. App. 54-55; *see also id.* at 55 ("reliance on creative lawyering that provides

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Dictionary 1354 (10th ed. 1994) (defining willful as "obstinately and often perversely self-willed" or "done deliberately: INTENTIONAL").

indefensible answers will [not] ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement"). Based upon such considerations, the Ninth Circuit in *Reynolds* reversed the grant of summary judgment in favor of the defendants on the issue of willfulness, ruling that "at least some" of the defendant insurance companies' interpretations of the FCRA were "implausible" or "frivolous." Pet. App. 48, 55.[15]

The Ninth Circuit's precepts as to the application of its willfulness/recklessness standard and its concerns that companies and attorneys will abuse situations in which they are faced with a question of "first impression" have no basis in the statutory language or in the legislative history. Moreover, if followed, the Ninth Circuit's articulation of its reckless standard will result in a massive and improper expansion of liability under the statute. Under the Ninth Circuit's decision, factors that normally favor a finding of an absence of willfulness and/or recklessness as a matter of law are turned on their heads, all in service of a jaundiced and unsupported view of how businesses and companies formulate their conduct in regulatory and compliance contexts and how lawyers view their obligations to their clients and to the legal system.

For example, the fact that an issue is one of first impression normally weighs toward excusing or mitigating a failure to understand a legal issue or comply with regulatory requirement. Thus, in *Stevenson*, 987 F.2d at 296, the Fifth Circuit reversed a finding of willful noncompliance and an award of punitive damages under the FCRA because "[t]here was no prior guidance to suggest" that the defendant's conduct did not comply with the Act.[16] Likewise, the fact

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[15] Although neither the trial court nor the Ninth Circuit ruled upon willfulness issues in connection with the claims against State Farm, the Ninth Circuit's decision in *Willes* made all aspects of its decision in *Reynolds* applicable to this case. *See* Pet. App. 24. Accordingly, the legal issues raised by the Ninth Circuit's application of its "willfulness" standard may properly be raised in this Petition.

[16] Similarly, in the context of Federal Rule of Civil Procedure 11, courts have repeatedly refused to find a legal argument frivolous or

that a defendant has consulted counsel or that the trial court agreed with the defendants' interpretation of their legal obligations would generally negate willfulness even under a recklessness standard. *See, e.g., Thurston*, 469 U.S. at 129 (defendant did not act in reckless disregard of ADEA's legal requirements where its "officials met with their lawyers to determine whether the mandatory retirement policy violated the Act"); *Reynolds v. Hartford Fin. Servs. Group*, 426 F.3d 1020, 1041 (9th Cir. 2005) (Bybee, J., dissenting in part) (disagreeing with the panel's ruling as a matter of law that defendants willfully failed to comply; noting that "district court *agreed* with [defendants'] legal position, a position the majority now declares to be 'nonsensical' and 'untenable'"), *amended*, 435 F.3d 1081 (9th Cir. 2006).[17] The Ninth Circuit improperly and incorrectly operates under the opposite presumption.[18]

In sum, the Ninth Circuit's decision presents a direct and substantial conflict between the Circuits regarding the statutory interpretation of the word "willful" in section 1681n of FCRA. This Court should grant certiorari to resolve that conflict and to correct the Ninth Circuit's erroneous interpretation and application of section 1681n.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

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unreasonable where it concerns a matter of first impression. *See* Georgene M. Vairo, *Rule 11 Sanctions* 340-46 (3d ed. 2004).

[17] *See also* Vairo, *supra* note 16, at 351 (the fact that judges who have ruled on the merits of a pleading disagree provides significant evidence that the pleading was not frivolous or unreasonable).

[18] Furthermore, contrary to the Ninth Circuit's implication that the meaning of the statutory definition of adverse action is "objectively apparent" (Pet. App. 54), the Federal Trade Commission, the agency charged with enforcing the FCRA, contended in its amicus brief filed in the Ninth Circuit in this case that the "statutory provision [defining adverse action] is ambiguous" and must be construed by resort to the legislative history. *See* Brief of the FTC as *Amicus Curiae* Supporting Appellant and Urging Reversal, at 16, *Willes v. State Farm Fire & Cas. Co.*, No. 03-35848 (9th Cir. Feb. 19, 2004).

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APPENDIX

RELEVANT STATUTES

15 U.S.C. § 1681a.

Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) **Consumer report.** —

(1) **In general.** — The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for —

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

(2) **Exclusions.** — The term "consumer report" does not include —

(A) any —

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) any communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 1681m of this title; or

(D) a communication described in subsection (o) of this section.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(i) The term "medical information" means information or records obtained, with the consent of the individual to

whom it relates, from licensed physicians or medical practitioners, hospitals, clinics, or other medical or medically related facilities.

(j) Definitions relating to child support obligations

(1) Overdue support

The term "overdue support" has the meaning given to such term in section 666(e) of Title 42.

(2) State or local child support enforcement agency

The term "State or local child support enforcement agency" means a State or local agency which administers a State or local program for establishing and enforcing child support obligations.

(k) Adverse action. —

(1) Actions included. — The term "adverse action" —

(A) has the same meaning as in section 1691(d)(6) of this title; and

(B) means —

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that

adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 1681 b(a)(3)(D) of this title; and

(iv) an action taken or determination that is—

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 1681b(a)(3)(F)(ii) of this title; and

(II) adverse to the interests of the consumer.

(2) Applicable findings, decisions, commentary, and orders. — For purposes of any determination of whether an action is an adverse action under paragraph (1)(A), all appropriate final findings, decisions, commentary, and orders issued under section 1691(d)(6) of this title by the Board of Governors of the Federal Reserve System or any court shall apply.

(l) Firm offer of credit or insurance. — The term "firm offer of credit or insurance" means any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of the following:

(1) The consumer being determined, based on information in the consumer's application for the credit or insurance, to meet specific criteria bearing on credit worthiness or insurability, as applicable, that are established—

(A) before selection of the consumer for the offer; and

(B) for the purpose of determining whether to extend credit or insurance pursuant to the offer.

(2) Verification —

(A) that the consumer continues to meet the specific criteria used to select the consumer for the offer, by using information in a consumer report on the consumer, information in the consumer's application for the credit or insurance, or other information bearing on the credit worthiness or insurability of the consumer; or

(B) of the information in the consumer's application for the credit or insurance, to determine that the consumer meets the specific criteria bearing on credit worthiness or insurability.

(3) The consumer furnishing any collateral that is a requirement for the extension of the credit or insurance that was —

(A) established before selection of the consumer for the offer of credit or insurance; and

(B) disclosed to the consumer in the offer of credit or insurance.

(m) Credit or insurance transaction that is not initiated by the consumer. — The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of —

(1) reviewing the account or insurance policy; or

(2) collecting the account.

(n) State — The term "State" means any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(o) Excluded communications — A communication is described in this subsection if it is a communication —

(1) that, but for subsection (d)(2)(E) of this section, would be an investigative consumer report;

(2) that is made to a prospective employer for the purpose of —

(A) procuring an employee for the employer; or

(B) procuring an opportunity for a natural person to work for the employer;

(3) that is made by a person who regularly performs such procurement;

(4) that is not used by any person for any purpose other than a purpose described in subparagraph (A) or (B) of paragraph (2); or

(5) with respect to which —

(A) the consumer who is the subject of the communication —

(i) consents orally or in writing to the nature and scope of the communication, before the collection of any information for the purpose of making the communication;

(ii) consents orally or in writing to the making of the communication to a prospective employer, before the making of the communication; and

(iii) in the case of consent under clause (i) or (ii) given orally, is provided written confirmation of that consent by the person making the communication, not later than 3 business days after the receipt of the consent by that person;

(B) the person who makes the communication does not, for the purpose of making the communication, make any inquiry that if made by a prospective employer of the consumer who is the subject of the communication would violate any applicable Federal or State equal employment opportunity law or regulation; and

(C) the person who makes the communication —

(i) discloses in writing to the consumer who is the subject of the communication, not later than 5 business days after receiving any request from the consumer for such disclosure, the nature and substance of all information in the consumer's file at the time

of the request, except that the sources of any information that is acquired solely for use in making the communication and is actually used for no other purpose, need not be disclosed other than under appropriate discovery procedures in any court of competent jurisdiction in which an action is brought; and

(ii) notifies the consumer who is the subject of the communication, in writing, of the consumer's right to request the information described in clause (i).

(p) Consumer reporting agency that compiles and maintains flies on consumers on a nationwide basis. — The term "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis" means a consumer reporting agency that regularly engages in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer's credit worthiness, credit standing, or credit capacity, each of the following regarding consumers residing nation:

(1) Public record information.

(2) Credit account information from persons who furnish that information regularly and in the ordinary course of business.

15 U.S.C. § 1681b.

Permissible purposes of consumer reports

(a) In general. — Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

> **(1)** In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.
>
> **(2)** In accordance with the written instructions of the consumer to whom it relates.
>
> **(3)** To a person which it has reason to believe —
>
> > **(A)** intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
> >
> > **(B)** intends to use the information for employment purposes; or
> >
> > **(C)** intends to use the information in connection with the underwriting of insurance involving the consumer; or
> >
> > **(D)** intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information —

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that —

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the

last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 654 of Title 42 for use to set an initial or modified child support award.

(b) Conditions for furnishing and using consumer reports for employment purposes. —

(1) Certification from user. — A consumer reporting agency may furnish a consumer report for employment purposes only if —

(A) the person who obtains such report from the agency certifies to the agency that —

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report a summary of the consumer's rights

under this subchapter, as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

(2) Disclosure to consumer. — A person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless —

(A) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(B) the consumer has authorized in writing the procurement of the report by that person.

(3) Conditions on use for adverse actions. — In using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates —

(A) a copy of the report; and

(B) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

(c) Furnishing reports in connection with credit or insurance transactions that are not initiated by the consumer. —

(1) **In general.** — A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of subsection (a)(3) of this section in connection with any credit or insurance transaction that is not initiated by the consumer only if —

(A) the consumer authorizes the agency to provide such report to such person; or

(B) (i) the transaction consists of a firm offer of credit or insurance;

(ii) the consumer reporting agency has complied with subsection (e) of this section; and

(iii) there is not in effect an election by the consumer, made in accordance with subsection (e) of this section, to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph.

(2) Limits on information received under paragraph (1)(B). —

A person may receive pursuant to paragraph (l)(B) only —

(A) the name and address of a consumer;

(B) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and

(C) other information pertaining to a consumer that does not identify the relationship or

experience of the consumer with respect to a particular creditor or other entity.

(3) Information regarding inquiries. — Except as provided in section 1681g(a)(5) of this title, a consumer reporting agency shall not furnish to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer.

(d) Reserved

(e) Election of consumer to be excluded from lists.—

(1) In general. — A consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(I)(B) of this section in connection with a credit or insurance transaction that is not initiated by the consumer, by notifying the agency in accordance with paragraph (2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or insurance transaction that is not initiated by the consumer.

(2) Manner of notification. A consumer shall notify a consumer reporting agency under paragraph (1) —

(A) through the notification system maintained by the agency under paragraph (5); or

(B) by submitting to the agency a signed notice of election form issued by the agency for purposes of this subparagraph.

(3) Response of agency after notification through system. — Upon receipt of notification of the election of a consumer under paragraph (1) through the notification system maintained by the agency under paragraph (5), a consumer reporting agency shall —

(A) inform the consumer that the election is effective only for the 2-year period following the election if the consumer does not submit to the agency a signed notice of election form issued by the agency for purposes of paragraph (2)(B); and

(B) provide to the consumer a notice of election form, if requested by the consumer, not later than 5 business days after receipt of the notification of the election through the system established under paragraph (5), in the case of a request made at the time the consumer provides notification through the system.

(4) Effectiveness of election. — An election of a consumer under paragraph (1) —

(A) shall be effective with respect to a consumer reporting agency beginning 5 business days after the date on which the consumer notifies the agency in accordance with paragraph (2);

(B) shall be effective with respect to a consumer reporting agency —

(i) subject to subparagraph (C), during the 2-year period beginning 5 business days after the date on which the consumer notifies the agency of the election, in the case of an election for which a consumer notifies the

agency only in accordance with paragraph (2)(A); or

(ii) until the consumer notifies the agency under subparagraph (C), in the case of an election for which a consumer notifies the agency in accordance with paragraph (2)(B);

(C) shall not be effective after the date on which the consumer notifies the agency, through the notification system established by the agency under paragraph (5), that the election is no longer effective; and

(D) shall be effective with respect to each affiliate of the agency.

(5) Notification system. —

(A) In general. — Each consumer reporting agency that, under subsection (c)(1)(B) of this section, furnishes a consumer report in connection with a credit or insurance transaction that is not initiated by a consumer, shall —

(i) establish and maintain a notification system, including a toll-free telephone number, which permits any consumer whose consumer report is maintained by the agency to notify the agency, with appropriate identification, of the consumer's election to have the consumer's name and address excluded from any such list of names and addresses provided by the agency for such a transaction; and

(ii) publish by not later than 365 days after September 30, 1996, and not less than

annually thereafter, in a publication of general circulation in the area served by the agency —

(I) a notification that information in consumer files maintained by the agency may be used in connection with such transactions; and

(II) the address and toll-free telephone number for consumers to use to notify the agency of the consumer's election under clause (i).

(B) Establishment and maintenance as compliance. — Establishment and maintenance of a notification system (including a toll-free telephone number) and publication by a consumer reporting agency on the agency's own behalf and on behalf of any of its affiliates in accordance with this paragraph is deemed to be compliance with this paragraph by each of those affiliates.

(6) Notification system by agencies that operate nationwide. — Each consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall establish and maintain a notification system for purposes of paragraph (5) jointly with other such consumer reporting agencies.

(f) Certain use or obtaining of Information prohibited. — A person shall not use or obtain a consumer report for any purpose unless —

(1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and

(2) the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification.

(g) Furnishing reports containing medical information. — A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction or a direct marketing transaction, a consumer report that contains medical information about a consumer, unless the consumer consents to the furnishing of the report.

15 U.S.C. § 1681n.

Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of

> **(1)(A)** any actual damages sustained by the consumer as a result of the failure or damages of not less thou $100 and not more than $1,000; or
>
> > **(B)** in the case of liability of a natural person for obtaining a consumer report under false pretences or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1.000, whichever is greater;
>
> **(2)** such amount of punitive damages as the court may allow; and
>
> **(3)** in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

15 U.S.C. § 1681o.

Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of-

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court;

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable to the pleading, motion, or other paper.

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AUGUST 4, 2005

This case was not selected for publication in the Federal Reporter. Please use FIND to look at the applicable circuit court rule before citing this opinion. (FIND CTA9 Rule 36-3.)

United States Court of Appeals, Ninth Circuit.
Julie WILLES, Plaintiff-Appellant,
v.
STATE FARM FIRE AND CASUALTY COMPANY; et al., Defendants-Appellees.
No. 03-35848.
D.C. No. CV-01-01457-AJB.

Argued & Submitted March 8, 2005.
Decided Aug. 4, 2005.

N. Roberta Stoll, Esq., Steve D. Larson, Esq., Scott A. Shorr, Esq., Stoll Stoll Berne Lokting & Schlachter, PC, Portland, OR, for Plaintiff-Appellant.

Stuart D. Jones, Esq., Portland, OR, for Defendants-Appellees.

Appeal from the United States District Court for the District of Oregon, Anna J. Brown, District Judge, Presiding.

Before REINHARDT, BERZON, and BYBEE, Circuit Judges.

MEMORANDUM

Plaintiff appeals from the district court's grant of summary judgment to all defendants. First, with regard to State Farm

Fire and Casualty Company, the district court granted summary judgment on the ground that in cases involving an initial policy of insurance, an "increased [sic] in any charge" cannot occur "unless the insurer makes an initial demand for payment to the insured and subsequently increases the amount of that demand based on information in the insured's credit report." In light of *Edo v. GEICO Casualty Co.*, No. 04-35279, we reject this holding and reverse. Second, the district court reasoned that although State Farm Mutual Automobile Insurance Company denied Willes a policy based on his credit information and made the decision that he would be charged at an increased rate, Mutual was not liable because Willes "did not apply for and was not denied insurance coverage by Mutual within the meaning of FCRA." Again, we reverse, in light of *Edo*. We remand these and all remaining issues to the district court for consideration in light of *Edo*.

REVERSED AND REMANDED.

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JANUARY 25, 2006

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JASON RAY REYNOLDS; MATTHEW RAUSCH, *Plaintiffs-Appellants*, v. HARTFORD FINANCIAL SERVICES GROUP, INC.; HARTFORD FIRE INSURANCE COMPANY, *Defendants-Appellees*.	No. 03-35695 D.C. No. CV-01-01529-AJB
AJENE EDO, *Plaintiff-Appellant*, v. GEICO CASUALTY COMPANY, *Defendant*, and GEICO GENERAL INSURANCE COMPANY; GEICO INDEMNITY COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY, Subsidiaries of Geico corporation, *Defendants-Appellees*.	No. 04-35279 D.C. No. CV-02-00678-AJB ORDER AND OPINION

Appeal from the United States District Court

for the District of Oregon
Anna J. Brown, District Judge, Presiding

Argued and Submitted
March 8, 2005—Portland, Oregon

Filed January 25, 2006

Before: Stephen Reinhardt, Marsha S. Berzon, and Jay S. Bybee, Circuit Judges.

Opinion by Judge Reinhardt

COUNSEL

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Robert D. Allen and Meloney Cargil Perry, Baker & McKenzie, Dallas, Texas; Christopher Van Gundy, Baker & McKenzie, San Francisco, California; Thomas Gordon, Gordon & Polscer, LLC, Portland, Oregon, for appellees GEICO Casualty Company, GEICO General Insurance Company, GEICO Indemnity Company, and Government Employees Insurance Company.

Lisa E. Lear, Douglas G. Houser, Loren D. Podwill, and Andrew Grade, Bullivant Houser Bailey PC, Portland, Oregon, for appellees Hartford Financial Services Group, Inc., and Hartford Fire Insurance Company.

William E. Kovacic, General Counsel, John F. Daly, Deputy General Counsel for Litigation, and Lawrence DeMille-Wagman, on behalf of the Federal Trade Commission as *amicus curiae* in support of appellants Edo, Rausch, and Reynolds.

Gilbert T. Schwartz and Heidi S. Wicker, Schwartz & Ballen LLP, on behalf of The American Insurance Association, The Property Casualty Insurers Association of America, The National Association of Professional Insurance Agents, and The National Association of Mutual Insurance Companies, as *amicus curiae* in support of appellees, Hartford Financial Services Group, Inc., and Hartford Fire Insurance Company.

ORDER

The opinion and dissent filed on October 3, 2005, amended on October 24, 2005, slip op. 14451, and appearing at 426 F.3d 1020 (9th Cir. 2005), is withdrawn. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit. The clerk shall file the attached opinion in its place.

OPINION

REINHARDT, Circuit Judge:

Under the Fair Credit Reporting Act ("FCRA"), insurance companies are required to send adverse action notices to consumers whenever they increase the rates for insurance on the basis of information contained in consumer credit reports. 15 U.S.C. §§ 1681a(k)(1)(B)(i), 1681m(a).[1]

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[1] Section 168 1m(a) provides that any person who "takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" must provide "notice of the adverse action to the consumer." Section 1681a(k)(1)(B)(i) defines an "adverse action" as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

The principal question before us is straightforward: Does FCRA's adverse action notice requirement apply to the rate first charged in an initial policy of insurance? We hold that the answer is yes: The Act requires that an insurance company send the consumer an adverse action notice whenever a higher rate is charged because of credit information it obtains, regardless of whether the rate is contained in an initial policy or an extension or renewal of a policy and regardless of whether the company has previously charged the consumer a lower rate.

We also resolve five ancillary questions. First, we hold that FCRA's adverse action notice requirement applies whenever a consumer would have received a lower rate for insurance had his credit information been more favorable, regardless of whether his credit rating is above or below average. Specifically, the requirement covers those whose credit information is disregarded and replaced for purposes of a rate computation by an average or neutral credit figure, so long as the insurance rates would have been lower had the credit information been more favorable. Second, we hold that charging more for insurance on the basis of a transmission stating that no credit information or insufficient credit information is available constitutes an adverse action based on information in a consumer report and therefore requires the giving of notice under FCRA. Third, we hold that, to comply with FCRA's notice requirement, a company must, *inter alia*, communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action. Fourth, we hold that when a consumer applies for insurance with a family of companies and is charged a higher rate for insurance because of his credit report, two or more companies within that family may be jointly and severally liable. The notice requirement applies to any company that makes a decision that a higher rate shall be imposed, issues a policy at a higher rate, or refuses to provide a policy at a

lower rate, if the company's action is based in whole or in part on the consumer's credit information.[2] Finally, we adopt the Third Circuit's definition of "willfully," as that term is employed in FCRA, and hold that a company is liable for a willful violation of FCRA if it "knowingly and intentionally committed an act in conscious disregard for the rights of others." *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir. 1997) (quoting *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996) (as amended)). Like the Third Circuit, we hold that conscious disregard means "either knowing that policy to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy contravened those rights." *Id.* at 227.

I. THE ACT AND THE APPEALS

The Fair Credit Reporting Act seeks to ensure the "[a]ccuracy and fairness of credit reporting" through a variety of means. 15 U.S.C. § 1681. Central to this goal, FCRA limits the persons who may obtain consumer credit reports and requires users of such reports to notify consumers when, in reliance on a consumer report, "adverse action" has been taken. 15 U.S.C. §§ 1681a, 1681b, 1681m. Specifically, § 1681m(a) provides: "If a person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," the person shall provide "notice of the adverse action to the consumer." Adverse action notices advise consumers that an adverse action has been taken against them, and the nature of that action, and alerts them that they may view a copy of the consumer report that triggered the adverse action free of charge and correct any errors affecting their economic well-being. Even if reports are free from error, adverse action notices give consumers important information about how

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[2] We do not intend this list to be exhaustive.

improved credit information may benefit them and how they can avoid receiving unfavorable credit ratings in the future.

To resolve the various issues that have arisen regarding FCRA's notice of adverse action requirement in a set of related cases, we have consolidated two appeals for purposes of this opinion: *Reynolds v. Hartford Financial Services Group, Inc.*, No. 03-35695 and *Edo v. GEICO Casualty Co.*, No. 04-35279. *Reynolds* presents the principal issue: May a rate first charged in an initial policy of insurance constitute an increased rate for purposes of the FCRA adverse action notice requirement? Hartford Fire asserts that a rate cannot qualify as increased unless a lower rate has previously been charged to the customer. *Reynolds* also presents the issues whether a communication stating that no credit information or insufficient credit information is available constitutes a "consumer report" under the statute and whether an adverse action notice that does not tell the consumer that an adverse action has been taken against him, describe that action and its effect upon the consumer, and identify the parties taking the action is sufficient under FCRA. *Edo* presents the issue whether an adverse action occurs whenever a consumer would have received a lower rate if his credit information had been more favorable; or whether an insurance company's practice of providing an adverse action notice only if the consumer's credit information is below average (or "neutral") and that factor results in the imposition of a higher rate than if his credit rating had been average, is consistent with FCRA. Both *Edo* and *Reynolds* also require us to decide which companies are liable under FCRA for the failure to give notice of an increased rate when several affiliated companies are involved in the process of rate-setting and policy issuance. Finally, defendants in both cases seek summary judgment on the alternative ground that their actions were not willful as a matter of law. To address this last contention, we must define the meaning of the term "willfully" as it applies in FCRA.

A. Reynolds v. Hartford Financial Services Group, Inc.

Jason Reynolds is the sole remaining named-plaintiff in this class action against Hartford Fire Insurance Company ("Hartford Fire").[3] He seeks statutory and punitive damages, as well as reasonable attorneys fees for the company's violation of FCRA's adverse action notice requirement. Reynolds' claims relate to two insurance policies he obtained, one for automobile and the other for homeowners insurance. On the record before us, Hartford Fire set the rates to be charged for both policies. Hartford Property and Casualty Insurance Company of Hartford ("PCIC Hartford") issued Reynolds the homeowners insurance policy and Hartford Insurance Company of the Midwest ("Hartford Midwest") issued him the automobile insurance policy. We refer to Hartford Fire, Hartford PCIC, and Hartford Midwest as the "Hartford Companies."

Reynolds originally sued Hartford Fire and later sought to amend his complaint to add PCIC Hartford and Hartford Midwest.[4] Hartford Fire sought summary judgment, which the district court granted on two grounds. First, it held that "the entity contracting with the policyholder is the only possible statutory taker of adverse action because only the contracting entity is capable of increasing the premium for or changing the terms of the insurance contract with the insured." Second, and in the alternative, it held that an insurance company that issues a policy to a new policyholder "cannot [be held to] 'increase' a charge for insurance unless the insurer makes an initial demand for payment of the insured and subsequently increases the amount of that demand based on information in the insured's credit report."

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[3] Rausch is no longer pursuing his appeal.

[4] Reynolds also named Hartford Financial Services Group, Inc., which serves as a holding company, but is not pursuing his claims against that entity.

The second and alternative holding relies on a previous decision by the same court, *Mark v. Valley Insurance Co.*, 275 F. Supp. 2d 1307, 1317 (D. Or. 2003). On the basis of that earlier decision, the district court also denied Reynolds leave to amend, reasoning that he could not "state viable FCRA claims against the proposed defendants," PCIC Hartford and Hartford Midwest. In other words, leave was denied on the ground that the policies were initial issues and no previous charge had been made to the customer at a lower rate.

The Hartford Companies' Use of Credit Information

During the relevant time period, Hartford Fire and the American Association of Retired Persons ("AARP") had an agreement under which Hartford Fire or one of its subsidiaries would issue automobile and homeowners insurance to AARP members at a premium rate if those individuals enjoyed favorable credit ratings. While the procedures used for issuing the two kinds of insurance varied slightly, they were the same in most relevant respects. In both cases, employees of Hartford Fire would make all of the decisions concerning AARP members' insurance policies for all of its subsidiaries, including Hartford Midwest, which issued automobile insurance, and PCIC Hartford, which issued homeowners insurance. In doing so, Hartford Fire's employees would obtain credit information from Trans Union, a consumer information bureau, through a contract to which Hartford Fire and Trans Union were signatories. This information would be conveyed to Hartford Fire through the risk assessment and data supply firm, ChoicePoint, in the form of an "insurance score." High insurance scores correlated with more favorable credit reports. With regard to automobile insurance, if an AARP member had a high enough insurance score, he would qualify for a ten percent discount. With regard to homeowners insurance, only if the member obtained a top insurance score could he be assigned to the top tier of insurance with the best rate.

If, when Hartford Fire sent a request for an insurance score, no credit information matched the name and address of the consumer or if the information that did match was insufficient to generate an insurance score, this information would be transmitted to the company, and the consumer would be labeled a "no hit" or a "no score" and would not be assigned an insurance score. Without an insurance score, the consumer could not qualify for the ten percent discount with Hartford Midwest, nor could he be placed in the top insurance tier with PCIC Hartford. As a result, a "no hit" or "no score" consumer would in numerous instances pay more for insurance than if he had received a high insurance score.[5]

The Hartford Companies' Adverse Action Policy

Hartford Fire is the only one of the Hartford Companies to have developed or sent adverse action notices. The parties dispute whether Hartford Fire actually sent an adverse action notice to Reynolds, but that is a question of fact for the fact-finder. Whether the notice Hartford Fire contends it sent was adequate under FCRA is a question of law that we discuss below.

Reynolds' Insurance Policies

Reynolds applied for both automobile and homeowners insurance by contacting the Hartford Companies. He had no existing policy with that group. An employee of Hartford Fire collected personal information and attempted to obtain

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[5] In connection with Reynolds' request for automobile insurance, he was labeled a "no hit" because his name and address did not match any person's in the national database. In connection with his homeowners insurance request, he was labeled a "no score" because, while his name and address did call up information in the database, the information was insufficient to generate an insurance score. As both a label of "no hit" and "no score" have the same practical effect, for convenience's sake we will hereafter refer in this opinion to a report in either category as a "no hit."

Reynold's insurance score twice, once for each insurance application. The credit bureau reported both times that Reynolds was a "no hit." *See* n.5, *supra*. Although Hartford Midwest issued him an automobile insurance policy and Hartford PCIC issued him a homeowners insurance policy, as a result of his "no hit" status Reynolds did not receive either of the AARP premium rates.

B. Edo v. GEICO Casualty Co.

The second of the consolidated cases relates to an automobile insurance policy obtained by Ajene Edo. Like Reynolds, Edo seeks statutory and punitive damages, as well as reasonable attorney fees, on behalf of a class of consumers for violation of FCRA's adverse action notice requirement. He, too, is the sole remaining named-plaintiff. Edo appeals the district court's grant of summary judgment to defendants Government Employees Insurance Company ("Government Employees"), GEICO General Insurance Company ("GEICO General"), and GEICO Indemnity Corporation ("GEICO Indemnity").[6] These are affiliated companies, all of which are subsidiaries of the GEICO Corporation and are referred to collectively by the parties as the "GEICO Companies." We sometimes refer to that group of companies by that designation and sometimes simply as GEICO.

Unlike Hartford Fire, the GEICO Companies concede that adverse actions can occur with respect to the first rates charged in an initial policy of insurance. They do not assert that in order for an adverse action to occur there must be an increase to a rate that the consumer has previously been charged. Nevertheless, the district court granted summary

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[6] Edo is not pursuing his appeal against GEICO Casualty Corporation ("GEICO Casualty"), a company that writes insurance policies for high risk consumers and charges the highest rates. GEICO Casualty did not issue a policy of insurance to Edo, and Edo did not seek to obtain a policy at the unfavorable rates the company charged.

judgment with respect to the various GEICO entities on a number of different grounds. First, the court held that Edo did not have standing to bring a FCRA claim against Government Employees because he "was not eligible for insurance coverage from [that company] regardless of his consumer credit score because Government Employees offers insurance coverage only to government employees or military personnel." Next, it granted summary judgment in favor of GEICO General because that company "did not contract with Plaintiff to issue or to underwrite an insurance policy." This ruling was in accord with the district court's previous holdings in other related cases that only the company that issues the insurance policy can be held to have taken an adverse action under FCRA. *See Ashby v. Farmers Group, Inc.*, 261 F. Supp. 2d 1213, 1222 (D. Or. 2003); *Razilov v. Nationwide Mut. Ins. Co.*, 242 F. Supp. 2d 977, 989-90 (D. Or. 2003). Finally, it granted summary judgment to GEICO Indemnity because "the premium charged to [Edo] by GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history."

GEICO's Use of Credit Information

The GEICO Companies are organized by risk. GEICO General provides preferred policies with low rates for those who are lesser insurance risks. Government Employees also provides preferred policies, but only to government employees. GEICO Indemnity issues standard policies with mid-level rates for moderate risk consumers. Finally, GEICO Casualty issues non-standard policies with high rates for those who are greater risks. The GEICO Companies began using consumer credit reports in early 1999.

In order to purchase insurance, consumers call a toll-free number and talk to a GEICO sales counselor. The sales counselor is employed by Government Employees but works on behalf of all of the GEICO Companies. Indeed, all of the

work of the GEICO Companies is performed by Government Employees workers, as the other companies do not have any employees. Upon learning that a customer wishes to purchase automobile insurance, the sales counselor elicits basic information and asks whether he may use the customer's credit information when arranging for his policy. If the customer acquiesces, the sales counselor obtains the credit information in the form of an insurance score calculated by the data analysis firm Fair Isaacs from information supplied by Trans Union. Government Employees is the only GEICO company that has a contract with Trans Union and Fair Isaacs to provide this information. Using a Government Employees computer system, the sales counselor converts the insurance score to a credit weight and combines it with other weights assigned to other insurance factors, such as age and number of accidents to arrive at a final total insurance weight. Based on that final weight, the sales counselor assigns the customer to one of the GEICO Companies and determines the appropriate insurance tier. This determination serves to establish the rate the consumer will be charged. After the information the customer has provided has been verified, he is issued an insurance policy at that rate.

GEICO's Adverse Action Policy

The GEICO Companies' original FCRA policy, adopted in 1999, was to send adverse action notices to all consumers whose credit reports were used in making insurance decisions. Later that same year, GEICO changed its policy, at least in part to reduce costs. Instead of sending adverse action notices to everyone, GEICO developed a system for determining which actions it deemed adverse by comparing the rate charged to the rate that it would have charged had the credit information been "neutral."

GEICO's new system, however, did not comply with FCRA's requirements. The GEICO Companies' policy during the period relevant to this case was to compare the

consumer's actual company and tier placement (which, as described above, was based in part on his credit rating) with the company and tier to which he would have been assigned had a "neutral" credit weight been substituted for his actual credit weight when calculating the final total insurance weight. The GEICO Companies' "neutral" credit weight was defined, generally speaking, as the weight that reflected the average credit rating of all consumers. The GEICO Companies would calculate two final total insurance weights, using only one variable —the actual credit weight in one case, and the "neutral" credit weight in the other. Only if the final total insurance weight using the "neutral" credit weight would have resulted in the consumer's placement with a different company or in a different tier than that to which the consumer was actually assigned, and only if such different placement would have resulted in the consumer's being charged a lower rate, would GEICO Companies issue an adverse action notice. In other words, the GEICO Companies' policy was to refrain from sending a statutory notice if use of the consumer's actual credit information caused the applicant to be placed with an entity and in a tier that resulted in the charging of the same or a lower rate than the rate that he would have been charged had the calculation and the ensuing assignment been based on a "neutral" or average credit rating. Under this policy, even if the rate ultimately charged was higher than the rate to which the consumer would have been entitled had he had a more favorable credit rating, the statutory notice was not sent if use of the "neutral" and the actual credit data would have led to an assignment to the same entity and tier. Thus, it was *not* GEICO's policy to send adverse action notices to all consumers who would have been charged lower rates had they enjoyed a more favorable credit rating.

Edo's Insurance Application

Following Edo's call to GEICO's toll-free number, the sales counselor used the credit information he obtained to

place its new customer with GEICO Indemnity. The GEICO Companies then applied its policy for determining whether an adverse action had occurred. GEICO calculated that, had the neutral credit weight been used instead of Edo's actual credit weight, the resulting final total weight would still have resulted in Edo's being placed with GEICO Indemnity. That Edo's placement, and the rate charged for his insurance, did not improve when the "neutral" weight was used is not surprising, as Edo's actual credit weight was better than average. Under its policy, however, the GEICO Companies did not issue him an adverse action notice.

It is uncontested that if the GEICO Companies had used the highest credit weight that a consumer could receive rather than the neutral credit rate to determine Edo's alternate placement, GEICO would have placed Edo with GEICO General, a preferred company, and offered him a lower insurance rate. In short, if Edo's credit information had been more favorable (even though it was already above average), he would have been charged less for his insurance. In 2002, the GEICO Companies changed its policy and began to issue adverse action notices whenever a report with more favorable credit information would have resulted in a lower insurance rate. Under the new policy, Edo would have received the statutory notice.

II. ANALYSIS

A. Initial Policies of Insurance

[1] The principal question in this and a number of related cases[7] constitutes a matter of first impression: Does FCRA's adverse action notice requirement apply to the rates first charged in an initial policy of insurance or is it limited to an

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[7] The related cases are resolved by memoranda of disposition filed concurrently herewith.

increase in a rate that the consumer has previously been charged? As with all statutory interpretation, we begin with the text of the statute. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). An adverse action with respect to insurance is defined by 15 U.S.C. § 1681a(k)(1)(B)(i) as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

Specifically, we must decide whether charging a higher price for initial insurance than the insured would otherwise have been charged because of information in a consumer credit report constitutes an "increase in any charge" within the meaning of FCRA. First, we examine the definitions of "increase" and "charge." Hartford Fire contends that, limited to their ordinary definitions, these words apply only when a consumer has previously been charged for insurance and that charge has thereafter been increased by the insurer. The phrase, "has previously been charged," as used by Hartford, refers not only to a rate that the consumer has previously paid for insurance but also to a rate that the consumer has previously been quoted, even if that rate was increased before the consumer made any payment. Reynolds disagrees, asserting that, under the ordinary definition of the term, an increase in a charge also occurs whenever an insurer charges a higher rate than it would otherwise have charged because of any factor— such as adverse credit information, age, or driving record[8] — regardless of whether the customer was

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[8] An adverse action under FCRA can, of course, only occur if the increase in charge was due to "information contained in a consumer report." 15 U.S.C. § 1681m(a). The consumer reports at issue in these cases are credit reports. While increases in charges may occur because of many factors, plaintiffs contest only the increases due to unfavorable credit information.

previously charged some other rate. According to Reynolds, he was charged an increased rate because of his credit rating when he was compelled to pay a rate higher than the premium rate because he failed to obtain a high insurance score. Thus, he argues, the definitions of "increase" and "charge" encompass the insurance companies' practice. Reynolds is correct.

[2] "Increase" means to make something greater. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The action, process, or fact of becoming or making greater; augmentation, growth, enlargement, extension."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) (defining "increase" as "growth, enlargement, etc[.]"). "Charge" means the price demanded for goods or services. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The price required or demanded for service rendered, or (less usually) for goods supplied."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("[T]he cost or price of an article, service, etc."). Nothing in the definition of these words implies that the term "increase in any charge for" should be limited to cases in which a company raises the rate that an individual has previously been charged.

[3] While no court has considered whether an increase requires a previous charge within the meaning of FCRA, the Sixth Circuit has employed the term "increase" in an analogous circumstance, stating, "An increase in the base price of an automobile that is not charged to a cash customer, but is charged to a credit customer, *solely because he is a credit customer*, triggers [the Truth in Lending Act's] disclosure requirements." *Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir. 2001). Defined in this manner, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price.

Second, the statutory definition of "adverse action," as it is made applicable to insurance, explicitly encompasses "*any* insurance, existing or applied for." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added). Congress' use of the latter phrase demonstrates its intent that "adverse actions" apply to all insurance transactions—from an initial policy of insurance to a renewal of a long-held policy. The text of the statute does not permit the imposition of any temporal limitation. Hartford has suggested no sensible alternative reading of "existing or applied for." Thus, reading the terms "increase" and "charge" in the context of the provision as a whole, particularly the "existing or applied for" phrase, supports affording them their ordinary meaning.

Third, our interpretation of the terms at issue best comports with the stated purpose of FCRA: to ensure the "[a]ccuracy and fairness of credit reporting." 15 U.S.C. § 1681. FCRA's adverse action notice requirement is an important tool that Congress created, using broad, encompassing language. Through this requirement, Congress sought to promote the rights of consumers by giving them essential information about how their credit report is used, information that they could obtain in no other way. The information Congress mandated serves two important ends. First and foremost, once consumers possess this information they can check and correct any errors in their credit reports. This increases the chances that a consumer's financial stability will not be hampered by faulty credit information. It also improves the overall accuracy of credit reports, which facilitates the operation of our markets. Second, even when credit reports are accurate, informing consumers when their credit rating is hurting them in the marketplace gives them important information about the benefits of improving their credit rating in the future and may even assist them in learning how to do so.

Hartford Fire's contention that FCRA does not apply to the rate charged in initial insurance policies would seriously

undermine Congress's clear purpose. The use of credit reports to help determine the rates to be charged for initial insurance policies is common. Moreover it is these policies that the economically unsophisticated are most likely to purchase. Congress did not create such strong protections for consumers only to render them inapplicable in so critical a circumstance. Furthermore, as FCRA is a consumer protection statute, we must construe it so as to further its objectives. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). While our interpretation is the plain one, this canon supports our result.

[4] We hold that whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA. Therefore, the fact that Reynolds' policy was an initial one, and his rate was the initial rate charged, is of no consequence. Reynolds' rate was increased above that which it would have otherwise been because of his credit report. As the statute's text is clear, we need not resort to either the agency's interpretations[9] or the statute's legislative history. The district court erred in granting summary judgment to Hartford Fire on the ground that FCRA does not apply to the rate first charged in an initial policy.[10]

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[9] We note that our holding is consistent with the Federal Trade Commission's interpretation of the statute. Because we find FCRA unambiguous, however, we reach our decision independently of, and do not defer to, the agency's interpretation. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984).

[10] Although our discussion has principally related to initial insurance policies, our interpretation of "increase in any charge" is obviously not limited to a consumer's first policy. As we have explained, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher

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B. What Constitutes An Adverse Action

The GEICO Companies contend that their method of determining which consumers were entitled to receive adverse action notices comported with FCRA, while Edo asserts that under GEICO's procedure numerous consumers who were charged increased rates because of their credit rating failed to receive the statutorily required notice. At the time Edo sought an initial insurance policy, it was GEICO's practice to send an adverse action notice to a consumer only if the use of his actual credit information resulted in his placement with an entity and tier that provided a higher insurance rate than the entity and tier to which he would have been assigned if "neutral" or average credit information had been used instead. In short, it was GEICO's policy to send adverse action notices only to some of the consumers who would have received more favorable rates had they enjoyed a better credit rating. Specifically, notices were sent only to those with below-average credit who would have been charged a lower rate for insurance had they received an average credit rating. GEICO contends that only in such circumstance has an adverse action occurred. GEICO is incorrect.

[5] FCRA does not limit its adverse action notice requirement to actions that result in the customer paying a higher rate than he would otherwise be charged because his credit rating is worse than the average consumer's. Instead, it requires such notices whenever a consumer pays a higher rate because his credit rating is less than the top potential score. In other words, if the consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable, an adverse action has been taken

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price. This definition applies equally to initial issues, amendments, and renewals of insurance policies.

against him.[11] Such is the case with Edo. Because Edo would have been placed with GEICO General instead of GEICO Indemnity and thus would have been charged a lower rate if his credit rating had been higher, an adverse action occurred and an adverse action notice was required under FCRA.[12] Under the GEICO formula, the fact that the credit rating Edo actually received was higher than the average rating did not mean that Edo would not be charged a higher rate than he would have been charged had he had an even better credit report, but it ensured that he would not receive an adverse action notice when he was charged that increased rate. The district court erred in granting GEICO Indemnity summary judgment on the ground that Edo's rate was not increased on the basis of his credit report.

C. "No Hit" Adverse Actions

Hartford Fire makes a separate argument as to why in Reynolds' case no adverse action was taken. Specifically, the company argues that no adverse action was taken against

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[11] We note that the statute does not require an insurance company to issue an adverse action notice simply because a consumer does not get the best possible rate. If a better credit report would not have reduced the consumer's insurance rate, his credit report is not the cause of the higher price and therefore no adverse action based on a credit report has occurred.

[12] Making a slightly different argument, at least rhetorically, the GEICO Companies also argue that the action they took against Edo was not adverse because he was placed in the same company that he would have been placed in had his credit information not been used. While this is a true statement, it is only so because if the consumer refuses to allow his credit information to be used, the sales counselor assigns the consumer the "neutral" credit weight. Therefore, the GEICO Companies' argument that the action was not adverse because it was the same as if no credit information had been used is functionally identical to its argument that the action was not adverse because it was not detrimental when compared to the result using a "neutral" credit rating. Thus, this argument fails as well.

Reynolds "based in whole or in part on any information contained in a consumer report" within the meaning of 15 U.S.C. § 1681m(a). When Hartford Fire requested credit information about Reynolds, Trans Union did not possess the necessary information to generate an insurance score and transmitted this finding to the insurer. Reynolds was therefore considered a "no hit." *See* n.5, *supra*. Because he was so designated, Reynolds was rendered ineligible for the premium rates available to AARP members with qualifying credit ratings, and, as a result, was charged a higher rate in his initial policies. Hartford Fire argues, however, that these were not adverse actions because, it contends, an "adverse action" occurs only if it is based on "information contained in a consumer report" and no such report was received with respect to Reynolds. We reject Hartford Fire's argument.

[6] FCRA's definition of "consumer report" is broad. It unquestionably encompasses a credit reporting agency's communication to an insurance company that a consumer does not have enough information on file for an insurance score to be calculated. Specifically, 15 U.S.C. § 1681 a(d)(1) explains that "[t]he term 'consumer report' means any written, oral, or other communication of *any information* by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, [or] credit capacity . . . ." (emphasis added). Reporting that an agency cannot obtain any information regarding a consumer or that a consumer has insufficient credit information on file conveys a message regarding the consumer's creditworthiness, standing, and capacity that makes his obtaining of credit far more difficult. Such a report suggests that the consumer cannot show that he pays debts in a timely manner. That information may be false: The credit agency may have used the wrong name or searched the wrong records, missing data that would have shown that the applicant is indeed creditworthy. Providing notice therefore serves the statutory purpose of allowing the consumer to correct errors in credit reports. Accordingly, we hold that a communication that a consumer has no

information available or an insufficient credit history to permit the calculation of a credit rating qualifies as "a consumer report" within the meaning of FCRA. Because it is uncontested that Reynolds would have been charged lower insurance rates had he received qualifying credit ratings and because the application of the "no hit" rule precluded him from receiving such ratings, we hold that an adverse action was taken against him on the basis of information contained in a credit report. Accordingly, the district court's order of summary judgment may not be affirmed on the ground that its actions with respect to Reynolds were not based on such information.

D. Adequacy Of The Notice

[7] Hartford Fire also urges us to affirm the district court's grant of summary judgment on the alternative ground that, although (in its view) it was not required under FCRA to send adverse action notices, the notices that the Hartford Companies did send were sufficient to meet its FCRA responsibilities. We reject this argument because the notices were inadequate as a matter of law. Under 15 U.S.C. § 1681m(a)(1), a company that takes adverse action on the basis of a consumer report must "provide oral, written, or electronic notice of the adverse action to the consumer" as well as meet a number of other specific requirements.[13] While the term "notice of an adverse action" is not defined in the statute, we hold that, at a minimum, such a notice must

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[13] The notice must also contain information regarding the consumer reporting agency. It it must provide the name, address, and telephone number of the agency that provided the report, a statement that the agency did not make the adverse decision and is not able to explain it to the consumer, a statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the agency, and a statement setting forth the consumer's right to dispute directly with the agency the accuracy or completeness of any information in the report. *See* 15 U.S.C. § 1681m(a)(2)-(3); 16 C.F.R. § 698, App. H.

communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action.[14] *See Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 150 (5th Cir. 1983) (requiring disclosure of "reliance on data contained in [a consumer's] credit report" when providing notice of an adverse action).

The notices Reynolds received did not comply with any of the above requirements. They did not tell him that any adverse action had been taken against him. They simply stated that "[t]he Hartford's eligibility and pricing decisions are based in part on consumer report(s) from a consumer reporting agency" and allowed him to make a written request in order to find out more. Reynolds was entitled to be informed that his rate for insurance was increased because of information in his credit report. He was also entitled to be told that Hartford Fire made the pricing decision and that Hartford PCIC and Hartford Midwest issued him policies at those higher rates. FCRA recognizes the difference between telling a consumer that his credit information *could* affect his insurance rate and that it *did* adversely affect his rate, and requires notice of the latter. We therefore reject Hartford Fire's alternative argument for upholding the district court's order.

E. Who Is Liable

The defendants all contend that only one company can be liable when an insurance policy contains an increase in rates —the issuing company. The plain text of the statute, as well as its purposes, are to the contrary. Here, we hold that all of the defendants are potentially liable under the statute.

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[14] We do not decide whether a fuller description of what specific information was adverse is required as this question is not before us.

[8] FCRA requires that "any person" who takes an adverse action is liable. 15 U.S.C. § 1681m(a). The definition of "any" includes the plural. *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("one, a, an, or some; one or more without specification or identification"). With regard to insurance transactions, liability attaches whenever an adverse action is taken "in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1) (B)(i). This broad "in connection with" language confirms that a variety of entities may be liable. No provision in the statute nor comment in the legislative history suggests that Congress intended that only a single company be responsible under FCRA when a consumer is charged an increased rate for insurance. Therefore, the defendants find themselves in the difficult position of persuading us that Congress intended something different from what it wrote. We analyze their three arguments separately.

First, GEICO argues that the words "applied for" in the definition of adverse action, § 1681a(k)(1)(B)(i), demonstrate that only the issuing company is liable under the statute. On that basis, GEICO asks us to hold that Edo "applied for" insurance only with GEICO Indemnity because that was the company that issued him a policy. The argument is frivolous, both factually and legally. As a matter of fact, Edo did not apply to one company but instead requested insurance from the GEICO family of companies. He did not specifically ask to be placed with GEICO Indemnity, and the GEICO Companies did not interpret his telephone call as requesting a policy with that company in particular, as evidenced by the evaluation by Government Employees of his eligibility for a policy from several of the GEICO affiliates. That he was placed with GEICO Indemnity and not another GEICO entity was the result of a decision made by Government Employees personnel, not the result of a limited application by Edo. Thus, GEICO's argument has no basis in fact. Furthermore, as a matter of law, we refuse to turn the words "applied for" into a legal term of art that refers only to the issuing company.

The clearest indication that Congress did not intend the words "applied for" to be used in such an unusual manner is that this interpretation would eliminate all potential FCRA liability for denials of insurance. No one disputes that FCRA defines the term adverse action to include denials. 15 U.S.C. § 1681a(k)(1)(B)(i). However, under GEICO's interpretation, because a consumer has not "applied for" insurance unless a policy has been issued and because a company that denies insurance has not, by definition, issued a policy, adverse action notices would never be required for denials of insurance. This is manifestly contrary to the statute, as it would eliminate from its coverage an important set of actions that Congress clearly intended to subject to FCRA's requirements.

Second, all the defendants argue that "*takes* any adverse action" limits FCRA's adverse action notice requirement to companies that actually issue an insurance policy. We find no such limitation in the statute by virtue of Congress's use of the word "takes" or otherwise. 15 U.S.C. § 1681m(a). To the contrary, adverse action is defined far more broadly than just "issuance." 15 U.S.C. § 1681a(k). The statutory definition specifically includes denials and cancellations as well as increases in rates, and other unfavorable changes, whenever and by whomever made. The word "takes" neither adds to nor detracts from that definition. It describes the act of engaging in the conduct that gives rise to the notice requirement. As discussed below, all of the companies at issue here took "adverse actions," as that term is defined in the statute.

Third and finally, all the defendants argue that we should hold liable only the issuing company because holding several companies liable for FCRA violations arising out of the issuance or denial of a single application will result in multiple, confusing adverse action notices, which would thwart rather than further FCRA's purpose. Such is not the case. Joint and several liability simply imposes the obligation

on all of the affiliated companies responsible for taking an adverse action to ensure that the affected consumer receives a statutory notice describing the adverse affect of his credit report within that family of companies. Multiple notices are not required; a single notice from the companies involved identifying those companies and their respective roles will suffice.

[9] Holding all the companies that take adverse action against a consumer jointly responsible for issuing a notice furthers FCRA's objectives. For example, joint responsibility substantially increases the prospect that an adverse action notice will be sent and that a customer who seeks to obtain insurance from a group of affiliated companies will be informed as to the manner in which his credit information adversely affected him. By imposing joint and several liability, Congress also improved the quality of information consumers receive, because each of the companies that takes an adverse action against the consumer must say so in the notice. We doubt that many consumers understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure. By having the organizations explain the actions each affiliated company took, Congress made it more likely that consumers would comprehend what transpired with respect to the increased cost of their policy.

[10] On the basis of the record before us all three GEICO Companies and Hartford Fire may be held liable under FCRA, as may the two other Hartford entities as to which leave to amend was denied.[15] Two of the GEICO

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[15] While the parties do not agree on every issue of fact, we hold that on the record before us there is no issue of material fact as to whether (1) Government Employees and Hartford Fire made the decisions that increased Edo's and Reynolds' rates, respectively, (2) GEICO General denied Edo a policy, and (3) GEICO Indemnity issued Edo a policy at an *(cont'd)*

Companies, working together, are responsible for increasing Edo's charge for insurance: Government Employees, which made the decision as to which of the GEICO family of companies would issue the insurance to Edo and, in so doing, determined that he would be charged at an increased rate, and GEICO Indemnity, which then issued the insurance policy at that increased rate. GEICO General is responsible because it denied Edo insurance for the reason that his credit rating was not sufficiently high. Hartford Fire, like Government Employees, made the critical rate-to-be-charged decision. It determined that, on the basis of Reynolds' credit report, he was not eligible for the lower rates afforded by its affiliates to the qualifying AARP members and that he would be charged for his insurance at a higher rate. Hartford Fire may therefore be held liable for increasing Reynolds' charges for insurance on the basis of his credit rating. Hartford PCIC and Hartford Midwest issued the policies to Reynolds at the increased rates determined by Hartford Fire, and may, accordingly, be held liable as well.

[11] In sum, Government Employees, GEICO General, and GEICO Indemnity may be held jointly and severally liable for failing to issue an adverse action notice to Edo. Likewise, Hartford Fire may be held liable for failing to issue a notice to Reynolds, and Reynolds may also properly state claims against Hartford PCIC and Hartford Midwest. Thus, Reynolds should be permitted to amend his claims on remand.

F. Meaning Of Willfully

Each of the defendants asks that we affirm the district court's grant of summary judgment on the alternative ground that, as a matter of law, its conduct was not willful. We must

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(cont'd from previous page)
increased rate. All of these actions were taken by the companies involved and all constituted "adverse actions" within the meaning of FCRA.

first define "willfully" as it appears in FCRA.[16] Interestingly, there is no legislative history to explain what Congress intended by the use of that term.

[12] We begin by following all five of the other circuits that have addressed the issue of the mens rea that is required with regard to the *act* that allegedly violates FCRA and hold that the act must have been performed "knowingly and intentionally." *See Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002); *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998); *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir. 1997). An act that is merely negligent is not willful. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) ("The word 'willful' is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent."). Additionally, we adopt the position of four of the five other circuits and hold that, although the act must be intentional, it need not be the product of "malice or evil motive." *See, e.g., Dalton*, 257 F.3d at 418 (holding that a plaintiff need not show malice or evil motive); *Cousin*, 246 F.3d at 372 (same); *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir. 1998); *Cushman*, 115 F.3d at 226 (same). *But see Duncan*, 149 F.3d at 429 (requiring "'a motivation to injure'"). In this respect, for purposes of willfulness we distinguish civil from criminal liability. *See Bryan v. United States*, 524 U.S. 184, 191 (1998) ("Most obviously [willfulness] differentiates between deliberate and unwitting

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[16] "Any person who *willfully* fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer" for actual or statutory damages, punitive damages, and reasonable attorney's fees. 15 U.S.C. § 1681n (emphasis added).

conduct, but *in the criminal law* it also typically refers to a culpable state of mind." (emphasis added)).

[13] Next, we address the more difficult question: What is the nature of the mens rea that is required with respect to the law? Here, we follow the Third Circuit. Specifically, we hold that as used in FCRA "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *Cushman*, 115 F.3d at 227. We adopt this holding for two principal reasons.

First, we believe that the Third Circuit's definition best comports with Supreme Court precedent. The Court has consistently stated that willfulness for civil liability requires either knowledge or reckless disregard with respect to whether an action is unlawful. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (quoting *Thurston* and holding that, for an alleged civil violation of the Age Discrimination in Employment Act (ADEA), "willful" requires only a "'reckless disregard for the matter of whether its conduct was prohibited by the ADEA'"); *McLaughlin*, 486 U.S. at 134 n.13 (using the *Thurston* definition of "willful" in interpreting the Fair Labor Standards Act); *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 242-43 (1938) (holding civil defendant's failure to unload a cattle car was "willful" because it showed a disregard for governing statute and an indifference to its requirements). The Court's rule with respect to civil cases differs from its rule in criminal proceedings. In criminal cases, actual knowledge of illegality is required for a willful violation of a criminal statute. *See Bryan*, 524 U.S. at 196 (requiring "knowledge that the conduct is unlawful" in a criminal case); *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994) (requiring proof that the criminal defendant "knew the structuring [of financial

transactions] in which he engaged was unlawful"); *Cheek v. United States*, 498 U.S. 192, 201 (1991) (requiring proof that a criminal "defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating").[17]

Second, the Third Circuit's approach best furthers the purposes and objectives of the Act. It is fair and balanced; it is practical as well. It avoids the two extremes of excusing noncompliance even though the answer to a previously undecided question is objectively apparent and imposing liability notwithstanding a truly excusable inability to predict future developments in the evolving construction of a statute by the courts. It encourages companies that use consumer credit reports to make the necessary effort to inform themselves fully and fairly as to their statutory obligations and, as a result, to carry out the statutory mandate of ensuring that consumers are notified when their credit information has been used against them. Unlike the defendants' preferred definition, the Third Circuit's standard does not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to "issues of first impression." Because a reckless failure to comply with FCRA's requirements can result in punitive damages, insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute.

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[17] The Eighth Circuit has rejected the reckless disregard standard and requires actual knowledge with regard to the law. *Phillips*, 312 F.3d at 370 ("[W]ilful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law."). The Sixth Circuit has implied that actual knowledge is necessary. *Duncan*, 149 F.3d at 429 (suggesting that an actual belief of legality suffices to defeat willfulness liability under FCRA). The Eighth and Sixth Circuits, however, ignore *Thurston* and the cases that follow its reasoning.

In sum, if a company knowingly and intentionally performs an act that violates FCRA, either knowing that the action violates the rights of consumers or in reckless disregard of those rights, the company will be liable under 15 U.S.C. § 1681n for willfully violating consumers' rights. A company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute. In contrast, neither a deliberate failure to determine the extent of its obligations nor reliance on creative lawyering that provides indefensible answers will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement. Reliance on such implausible interpretations may constitute reckless disregard for the law and therefore amount to a willful violation of the law.

[14] Where, as here, at least some of the interpretations are implausible, consultation with attorneys may provide evidence of lack of willfulness, but is not dispositive. *See Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 645 (9th Cir. 1993); *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 409 (5th Cir. 1989) (stating that "seeking legal advice [does not] ipso facto establish[ ] the appropriate intent [willfulness]"). Whether or not there is willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation. In some cases, it may also depend in part on the specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel. Because the parties did not have an adequate opportunity to explore the issue in the district court, we remand for further proceedings.

III. CONCLUSION

In conclusion, we hold that FCRA applies, *inter alia*, to the first rates charged in initial insurance policies. We also hold that FCRA requires insurance companies to send adverse action notices whenever they charge a higher rate for insurance, in initial policies or otherwise, because of the consumer's credit information, not simply when the consumer's credit rating is below average. Furthermore, we hold that a communication that there is a lack of sufficient credit information regarding a consumer is a credit report within the meaning of FCRA. In addition, we hold that adverse action notices must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action. With respect to which companies in a group may be liable under FCRA, we hold that a company that makes the rate-setting decision, a company that issues the insurance policy, and any company that denies insurance at a more favorable rate may be held jointly and severally liable, and that such companies may provide a single adverse action notice to consumers containing all of the requisite information. Finally, we adopt the Third Circuit's definition of "willfully": Reckless disregard is sufficient.

As a consequence of these rulings, we hold that the district court erred in granting summary judgment to Hartford Fire on the basis that increased charges for insurance in an initial policy do not constitute adverse actions, and in denying Reynold's request for leave to amend his complaint to add Hartford PCIC and Hartford Midwest for that same reason. Likewise, we hold that the district court erred in granting summary judgment to GEICO Indemnity on the basis that the actions it took were not adverse and granting summary judgment to Hartford Fire, Government Employees, and GEICO General on the basis that only the issuer of insurance can be liable under FCRA. Next, we hold that

summary judgment may not be granted on the alternative grounds that a transmission that a consumer has insufficient credit information to generate a score is not a credit report, or that Hartford Fire's adverse action notices were sufficient. In sum, we reverse the district court's grant of summary judgment with respect to all defendants in both *Edo* and *Reynolds*, reverse its denial of Reynolds' request to amend his complaint to add Hartford PCIC and Hartford Midwest, and remand to the district court for further proceedings consistent with this opinion.[18]

REVERSED and REMANDED.

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[18] We note that on appeal, plaintiffs seek only a reversal of the grant of summary judgment to defendants, and do not request such a judgment on their own behalf. Although "a court has the power sua sponte to grant summary judgment to a non-movant when there has been a motion but no cross-motion," we decline to do so here. *Kassbaum v. Steppenwolf Prod., Inc.*, 236 F.3d 487, 494 (9th Cir. 2000).

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED APRIL 20, 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JULIE WILLES	No. 03-35848
Plaintiff-Appellant,	D.C. No. CV-01-01457-AJB
v.	District of Oregon, Portland
STATE FARM FIRE AND CASUALTY COMPANY; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	ORDER
Defendant-Appellees,	
and	
MELISSA BOWMAN,	
Defendant.	

Before: REINHARDT, BERZON, and BYBEE, Circuit Judges.

The panel has voted unanimously to deny Appellees' petition for rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge

has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and rehearing en banc is denied.

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED JULY 31, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

JULIE WILLES and MELISSA BOWMAN,	:	CV 01-1457-BR
Plaintiffs,	:	OPINION AND ORDER
v.	:	
STATE FARM FIRE AND CASUALTY COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	:	
Defendants.	:	

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BROWN, Judge.

This matter comes before the Court on Defendant State Farm Fire and Casualty Company's (Fire and Casualty) Motion for Partial Summary Judgment (#84) as to the claim of Plaintiff Julie Willes[1] and Defendants' Motion to Strike Birnbaum and Wogalter Declarations (#110) from the summary judgment record. On July 29, 2003, the Court heard oral argument on these Motions.[2]

For the following reasons, the Court **GRANTS** Fire and Casualty's Motion for Summary Judgment and, therefore, **DISMISSES with prejudice** Willes's claims against Fire

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[1] On August 27, 2002, the Court dismissed Plaintiff Melissa Bowman's claims against both Defendants.

[2] The Court also heard oral argument on Defendant State Farm Mutual Automobile insurance Company's Motion for Partial Summary Judgment. During oral argument, the Court took under advisement Mutual's Motion for Partial Summary Judgment and that portion of Defendants' joint Motion to Strike that pertains to the record on Mutual's Motion for Partial Summary Judgment. The Court will address those Motions in a separate Opinion and Order to be issued in due course.

and Casualty. The Court also **DENIES as moot** Defendants' Motion to Strike to the extent that Motion relates to Fire and Casualty's Motion for Partial Summary Judgment.

DISCUSSION

A. Fire and Casualty's Motion for Partial Summary Judgment

In Plaintiffs' Third Amended Complaint, Willes alleges Fire and Casualty took adverse actions with respect to Plaintiff Willes and all those similarly situated based on information contained in consumer reports and failed to provide them with adequate notification of those adverse actions as required by the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681. In particular, Willes asserts Fire and Casualty took adverse actions when it initially wrote Willes's three automobile insurance policies on less favorable terms than otherwise were available to persons with better credit histories. Willes further asserts Fire and Casualty increased the charge for her insurance or unfavorably or adversely changed the terms of her insurance because Fire and Casualty is a standard insurance company that offers less favorable terms and rates that are "generally" higher than its affiliated, preferred insurance company, Mutual.

Willes's claims are based solely on Fire and Casualty's initial setting of her premium rates. This Court previously concluded an insurer cannot "increase" a charge for insurance unless the insurer makes an initial demand for payment to the insured and subsequently increases the amount of that demand based on information in the insured's credit report. *See Mark v. Valley Ins. Co.*, CV 01-1575-BR (J. Brown) (issued July 10, 2003). The Court similarly concludes an insurer cannot "reduce" or "unfavorably or adversely change" the terms of insurance unless such terms previously existed and the insurer subsequently alters those terms in an unfavorable manner. Based on this Court's

decision and analysis *Mark*, the Court concludes Fire and Casualty is entitled summary judgment as to Willes's FCRA claim because the initial setting of her insurance premiums did not constitute "adverse actions" under FCRA.[3]

B. Defendants' Motion to Strike Birnbaum and Wogalter Declarations

In support of her Opposition to Fire & Casualty's Motion for Summary Judgment, Willes filed the Declarations of proposed expert witnesses Michael S. Wogalter and Birny Birnbaum. To the extent the declarations contain legal arguments or suggest interpretations of the plain meaning of FCRA, the Court concludes the proposed expert affidavits do not contain material that is the proper subject of expert testimony. The Court, therefore, did not consider that testimony. To the extent the declarations contain some factual information, none of that information is relevant to the issue decided by the Court, and, therefore, the Court did not consider that testimony when deciding Fire and Casualty's Motion for Partial Summary Judgment. Accordingly, the Court denies as moot that portion of the Motion to Strike that relates to Fire & Casualty's Motion for Partial Summary Judgment.

CONCLUSION

For these reasons, the Court **GRANTS** Fire and Casualty's Motion for Partial Summary Judgment (#84) and, therefore, **DISMISSES with prejudice** Willes's claims against Fire and Casualty. The Court also **DENIES as moot** Defendants' Motion to Strike Birnbaum and Wogalter Declarations (#110) to the extent that Motion relates to Fire and Casualty's Motion for Partial Summary Judgment.

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[3] The Court does not reach the additional arguments in support of Fire and Casualty's Motion for Partial Summary Judgment.

IT IS SO ORDERED.

DATED this 31st day of July, 2003.

/s/Anna J. Brown
ANNA J. BROWN
United States District Judge

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED SEPTEMBER 9, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

JULIE WILLES and MELISSA BOWMAN,	:	**CV 01-1457-BR**
Plaintiffs,	:	**OPINION AND ORDER**
v.	:	
STATE FARM FIRE AND CASUALTY COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	:	
Defendants.	:	

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BROWN, Judge.

This matter comes before the Court on Defendant State Farm Mutual Automobile Insurance Company's (Mutual) Motion for Partial Summary Judgment (#82) on the claim of Plaintiff Julie Willes [1] and Mutual's Motion to Strike Birnbaum and Wogalter Declarations (#110). On July 29, 2003, the Court heard oral argument on these motions.

On the same date, the Court also heard oral argument on Defendant State Farm Fire and Casualty Company's (Fire & Casualty) Motion for Partial Summary Judgment. After oral argument, the Court took under advisement Mutual's Motion for Partial Summary Judgment and the portion of Defendants' joint Motion to Strike Birnbaum and Wogalter Declarations that pertains to Mutual's Motion for Partial Summary Judgment. The Court issued its Opinion and Order granting Fire & Casualty's Motion for Partial Summary Judgment on July 31, 2003.

For the following reasons, the Court **GRANTS** Mutual's Motion for Partial Summary Judgment and, therefore,

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[1] On August 1, 2003, the Court dismissed Plaintiff Melissa Bowman's claims against both Defendants.

DISMISSES Willes's claims against Mutual. The Court also **DENIES as moot** Mutual's Motion to Strike.

MUTUAL'S MOTION FOR SUMMARY JUDGMENT

Standards

I. Summary Judgment.

Fed. R. Civ. P. 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002). In response to a properly-supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine issue of material fact for trial. *Id.*

An issue of fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Villiarmo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The Court must draw all reasonable inferences in favor of the nonmoving party. *Id.* A mere disagreement about a material issue of fact, however, does not preclude summary judgment. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1389 (9th Cir. 1990). When the nonmoving party's claims are factually implausible, that party must come forward with more persuasive evidence than otherwise would be required. *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998) (citation omitted).

The substantive law governing a claim or a defense determines whether a fact is material. *Addisu v. Fred Meyer, Inc.*, 198 F. 3d 1130, 1134 (9th Cir. 2000). If the resolution of a factual dispute would not affect the outcome of the claim,

the court may grant summary judgment. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

II. Statutory Construction

When a district court interprets a federal statute, it must apply a two-part analysis. "The first and most important step in construing a statute is the statutory language itself." *Royal Foods Co. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2001) (citing *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984)). The court must look to the text of the statute to "'determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

"The meaning - or ambiguity - of certain words or phrases may only become evident when placed in context." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Accordingly, it is a "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Id.* at 133 (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). A court, therefore, must "interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *Food and Drug Admin.*, 529 U.S. at 133 (internal quotations and citations omitted).

If the congressional intent is clear from the plain meaning of the statute, the court need not look any further for guidance. *Id.* If the statute is ambiguous, however, the court must proceed to the second step and determine the meaning of the statutory language by giving deference to the governing agency's interpretation as long as that interpretation is permissible. *Id.* at 132. If there is no agency

interpretation and the text of the statute is ambiguous, the court may look to legislative history as an aid to discern congressional intent. *In re Bankr. Estate of MarkAir, Inc.*, 308 F.3d 1038, 1043 (9th Cir. 2002).

III. Fair Credit Reporting Act (FCRA).

Congress enacted FCRA for the stated purpose of requiring credit reporting agencies to adopt "reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681(b). Although FCRA generally regulates credit reporting agencies, it also creates obligations for certain users of consumer credit information. In particular, 15 U.S.C. § 1681m(a) provides: "[I]f a person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," the person shall provide "notice of the adverse action to the consumer."

FCRA defines "adverse action" in relevant part as follows:

> The term "adverse action" -
>
> (A) has the same meaning as in section 1691(d) (6)[2] of this title; and

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[2] 15 U.S.C. § 1691(d)(6) is part of the Equal Credit Opportunity Act (ECOA). That section provides:

[T]he term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an

(cont'd)

(B) means -

(i) a denial or cancellation of, an increase in any charge of, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.

15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

Facts

As best the Court can discern from the parties' statements of concise facts and their statements in oral argument, the following material facts are undisputed.

On August 1, 2001, Willes contacted a State Farm insurance agent to obtain a quote for automobile insurance. The agent then conducted a field underwriting interview with Willes. Willes told the agent she hoped to obtain the best coverage available under a State Farm policy. In response to questions from the agent, Willes disclosed she had received a speeding ticket within the preceding 36 months. After the field underwriting interview, the agent prepared and submitted quotes for automobile insurance to Fire & Casualty, which, in turn, responded to Willes through the agent with a quote for such insurance. The agent did not submit a quote to Mutual because she knew Willes would not be eligible for a Mutual policy because of the speeding ticket unless she qualified as an exception under State Farm's general automobile underwriting guidelines. When she

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(cont'd from previous page)
existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

received the quote, Willes applied for insurance with Fire & Casualty.

The agent then accessed an internet on-line Agents Underwriting Information (AUI) system that provides loss-history reports, undisclosed driver reports, and an underwriting score algorithm that weighs other information pertaining to an applicant for insurance, including a consumer credit report. When a potential insured is ineligible for a policy issued by Mutual and the agent accesses AUI's system regarding the potential insured, AUI issues a return message to the agent indicating whether the potential insured qualifies for an exception based on the underwriting score generated by AUI. If the underwriting score is not high enough to qualify for an exception, AUI transmits a message stating "Bind in Standard only, if otherwise Eligible for Standard Program." The agent does not have the authority to quote coverage with Mutual unless AUI returns a message that indicates an exception can be made. Although the factual record presented by the parties lacks clarity on this fundamental point, the Court assumes for purposes of Mutual's Motion that, because of Willes's credit history, the underwriting score generated by AUI for Willes was too low to justify an exception that would permit placement of her insurance with Mutual.

Willes's Claim.

In her Third Amended Complaint, Willes alleges both Fire & Casualty and Mutual took adverse actions with respect to her and all potential class members similarly situated based on information contained in consumer credit reports and failed to provide them with adequate notification of those adverse actions as required by the FCRA, 15 U.S.C. § 1681.

Below is a summary of differences between Willes's claims against Defendants Fire & Casualty and Mutual.

1. Claim against Fire & Casualty.

Willes asserted Fire & Casualty took adverse action against her when it initially wrote her three automobile insurance policies on less favorable terms than otherwise were available to persons with better credit histories. Willes further asserted Fire & Casualty increased the charge for or unfavorably or adversely changed the terms of her insurance because Fire & Casualty is a standard insurance company that offers less favorable terms and rates than Mutual, its affiliated insurance company. Accordingly, Willes's claims against Fire & Casualty were based solely on Fire & Casualty's initial setting of her premium rates.

This Court previously concluded an insurer cannot "increase" a charge for insurance unless the insurer makes an initial demand to the insured for payment and subsequently increases the amount of that demand based on information in the insured's consumer credit report. *See Mark v. Valley Ins. Co.*, CV 01-1575-BR (J. Brown)(July 10, 2003). In its Opinion and Order granting Defendant Fire & Casualty's Motion for Partial Summary Judgment, the Court similarly concluded an insurer cannot "reduce" or "unfavorably or adversely change" the terms of insurance unless such terms previously existed and the insurer subsequently altered those terms in an unfavorable manner. Based on its decision and analysis in Mark, the Court concluded Fire & Casualty was entitled to summary judgment on Willes's FCRA claim because the initial setting of her insurance premiums did not constitute "adverse actions" under FCRA.

2. Claim against Mutual.

Willes asserted she applied for and was denied an automobile insurance policy with Mutual because of

information relating to her credit history contained in a consumer credit report. Mutual's alleged adverse action was the denial of Willes's alleged application for Mutual's preferred policy, which would have been at lower premium rates than the policies ultimately issued to Willes by Fire & Casualty.

Discussion

The threshold issue before the Court is whether Willes applied for automobile insurance with Mutual. If so, issues of fact and law exist as to whether (1) Mutual took adverse action by denying Willes's application because of her credit history, and (2) whether Mutual gave Willes adequate notice of such adverse action under FCRA.

Mutual contends Willes did not ask for nor apply specifically for automobile insurance with Mutual, but merely asked a State Farm agent for the best coverage available in a State Farm policy. After Willes disclosed she had a speeding violation, the agent knew Willes was ineligible for a Mutual policy. In light of the disclosed speeding violation, the State Farm computer system in effect at the time permitted the agent to submit a request for a quote on a Fire & Casualty policy, but not on a Mutual policy. On receipt of the quote from Fire & Casualty, Willes signed a separate "Application for State Farm Fire and Casualty Insurance" for each of three vehicles she owned. Willes did not apply for a Mutual policy because she was not eligible for such a policy.

Willes asserts Mutual's view of the "application process" is too narrow. Willes contends:

> During the application process, after the "field underwriting interview," State Farm Mutual made a determination about whether plaintiff

> could receive a State Farm Mutual policy. State Farm Mutual determined that plaintiff could not receive a State Farm Mutual policy. That determination directly resulted in an action of denial by State Farm Mutual and the issuing of policies with State Farm Fire. That action was based, in part, on plaintiff's credit score.

Pl.'s Resp. Mem. at 6. Willes characterizes the application process as one in which the agent "submitted her [qualifying] information to the AUI system . . . to determine whether plaintiff should be written in State Farm Mutual or State Farm Fire. An application was made to both companies."

After considering the parties' arguments and after reviewing the facts in the light most favorable to Willes, the Court finds Willes made only one application for insurance, and that application was directed to Fire & Casualty. The State Farm agent who Willes contacted made the initial determination, without regard to credit history, that Willes did not qualify for the Mutual policy because of her driving record. The agent submitted a request for a quote to Fire & Casualty only. Fire & Casualty responded with a quote. Willes then submitted applications on each of her automobiles to Fire & Casualty. Mutual, via the AUI, could have created an exception to Mutual's underwriting guidelines during the pre-application process depending on Willes's credit score. At the time the AUI system indicated Mutual would not make an exception in Willes's case, however, Willes had not requested insurance with Mutual and the State Farm agent had requested a quote from Fire & Casualty only.

Willes cites the definition of "application" from *Black's Law Dictionary* as, *inter alia*, "[t]he act of making a request for something." *Black's Law Dictionary* 98-99 (6th ed. 1990). Although the Court assumes Willes told the agent she hoped

to obtain the best coverage available under any State Farm policy, the State Farm agent's request for insurance quotes and Willes's applications were made to Fire & Casualty only because of Willes's disqualifying speeding ticket. Willes's hope to obtain the best coverage available is too generic to be an "application" for insurance with Mutual.

The Court, therefore, concludes Willes did not apply for and was not denied insurance coverage by Mutual within the meaning of FCRA, 15 U.S.C. § 1681a(k)(1)(b)(i).

MUTUAL'S MOTION TO STRIKE BIRNBAUM AND WOGALTER DECLARATIONS

In light of the Court's ruling on Mutual's Motion for Partial Summary Judgment, Mutual's Motion to Strike is moot.

CONCLUSION

For these reasons, the Court **GRANTS** Mutual's Motion for Partial Summary Judgment (#82) and, therefore, **DISMISSES with prejudice** Willes's claims against Mutual. The Court also **DENIES as moot** Defendants' joint Motion to Strike Birnbaum and Wogalter Declarations (#110) to the extent that Motion relates to Mutual's Motion for Partial Summary Judgment.

IT IS SO ORDERED.

DATED this 9th day of September, 2003.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge

(4) (4) (4) (4)

Nos. 06-82, 06-84, 06-100, 06-101

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HARTFORD FIRE INSURANCE CO.,
Petitioner,

v.

JASON RAY REYNOLDS,
Respondent.

SAFECO INSURANCE CO. OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

GEICO GENERAL INSURANCE CO., ET AL.,
Petitioners,

v.

AJENE EDO,
Respondent.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.,
Petitioners,

v.

JULIE WILLES,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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August 2006

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QUESTIONS PRESENTED

1. Whether petitioners have presented compelling reasons for this Court to review the meaning of the term "willful" in one subsection of the Fair Credit Reporting Act ("FCRA") in cases that are premature for review because (a) these cases are still at an interlocutory stage and were remanded for further proceedings following a reversal of summary judgment, (b) no court has ever examined the evidence of willfulness or applied any "willful" standard to the facts, and (c) there is no factual record of the "advice of counsel" defense that petitioners now raise on remand to refute a finding of willfulness?

2. Assuming that this Court should review at this interlocutory stage in the absence of a complete factual record, whether petitioners have presented compelling reasons for review in the absence of a true circuit split over the meaning of a "willful" violation for the particular subsection 15 U.S.C. § 1681n (a)(1)(A) of the FCRA that is at issue?

3. Whether GEICO, State Farm and Hartford Fire present compelling reasons to review the Ninth Circuit's interpretation of the definition of an "adverse action" and the notice requirements under the FCRA when petitioners fail to identify any conflicts among the circuits over those issues or demonstrate that the Ninth Circuit's analysis of the statutory definition is either incorrect or raises issues of national importance?

PARTIES TO THE COMBINED OPPOSITION

For the Court's convenience, respondents Jason Reynolds, Charles Burr, Shannon Massey, Ajene Edo and Julie Willes file this joint opposition to the petitions for writs of *certiorari* filed respectively by Hartford Fire Insurance Company ("Hartford Fire") (No. 06-82); Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon (collectively, "Safeco") (No. 06-84); GEICO General Insurance Company, GEICO Indemnity, and Government Employees Insurance Company (collectively, "GEICO") (No. 06-100); and State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company (collectively, "State Farm") (No. 06-101). Respondent Reynolds is the respondent in No. 06-82; respondents Burr and Massey are respondents in No. 06-84; respondent Edo is the respondent in No. 06-100; and respondent Willes is the respondent in No. 06-101. Because petitioners filed separate petitions that raise overlapping issues largely arising out of a single Ninth Circuit opinion, respondents file a single combined opposition.

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INTRODUCTION

The respondents in these cases are individual consumers of automobile and property/casualty insurance who suffered "adverse actions" under the FCRA when the petitioners, various insurance companies, charged them more for insurance or denied them insurance based in part on their credit information. The Ninth Circuit held that petitioners' actions were "adverse actions" within the meaning of FCRA and remanded for further consideration the arguments of certain petitioners that their actions could not be found "willful." The principal argument in these four petitions is that the Ninth Circuit erred in interpreting "willful" to include either knowing or reckless disregard for consumers' rights under the FCRA. Petitioners claim the Ninth Circuit's holding conflicts with the definition of willfulness determined by other circuits. This issue does not merit review for several reasons.

First, review of the willfulness issue by this Court would be premature. These cases arise on summary judgment and the Safeco petition involves a Fed. R. Civ. P. 54(b) interlocutory appeal. Neither the trial court nor the Ninth Circuit has yet examined the evidence to determine whether petitioners acted willfully, either knowingly or recklessly. The Ninth Circuit remanded the case so the district court could examine the evidence. Further, contrary to petitioners' contentions that they have been prevented from or prejudiced in raising the advice of counsel defense, the Ninth Circuit was not presented with an advice of counsel defense, nor did it resolve whether petitioners are entitled to such a defense. The Ninth Circuit's statements concerning the defense are *dicta*. Following remand, petitioners GEICO and Safeco have raised this defense in the trial courts. It would be premature to grant *certiorari* when there is no factual record on advice of counsel and the larger factual issue of willfulness is unresolved.

This is particularly so in a case involving an abstract concept: the meaning of "willfulness." Willfulness is a fact-bound determination not readily explained by labels such as

"reckless disregard" or "conscious disregard." This Court will provide little useful guidance to the lower courts, attorneys, or those regulated by the FCRA if it attempts to apply such labels without a concrete evidentiary record and lower court factual findings. The meaning of a knowing or reckless violation only becomes clear against a well developed record that has been reviewed by a fact-finder and includes any evidence of advice of counsel on which the petitioners may wish to rely. The Ninth Circuit simply remanded the case to the district court to review the facts and provide that record.

Second, there is no square circuit conflict. The FCRA has several different liability sections and subsections. The statutory subsection at issue here, 15 U.S.C. § 1681n (a)(1)(A), merely requires proof of a "willful" violation. The immediately following FCRA subsections expressly require proof of both a willful *and* knowing violation or solely refer to a knowing violation without reference to willfulness. 15 U.S.C. §§ 1681n(a)(1)(B), 1681n(b), and 1681q. Thus, the FCRA's text makes clear that a willful violation is something less than a willful and knowing violation. The claimed circuit split is not a conflict over the interpretation of the text of the particular statutory subsection at issue here. Rather, the cases on which petitioners rely either interpret different statutory subsections, focus on the proof required to establish punitive damages, which are not at issue here, or fail to interpret the particular language of section 1681n(a)(1)(A).

Third, although petitioners assert that the Ninth Circuit's decision will expose them to a flood of litigation over the type of conduct at issue here, there is a serious question whether there is any remaining civil remedy for such violations. In the last two years, eleven different courts, including the Seventh Circuit, have concluded that the 2003 Fair and Accurate Credit Transaction Act (FACTA), which amended the FCRA, eliminated subsection 1681n claims filed after the passage of that Act for violations of section 1681m (the statute at issue here) postdating FACTA. Contrary to petitioners'

unsupported speculation that there has been an explosion in private litigation under the FCRA as a result of the Ninth Circuit's ruling, nearly every court to review the issue has concluded that FACTA prospectively eliminated the civil claims asserted here. The Ninth Circuit's ruling may thus have significance only for the finite class of pre-FACTA claims, obviating the importance of review by this Court.

Finally, petitioners State Farm, GEICO and Hartford Fire raise issues regarding the Ninth Circuit's interpretation of the definition of "adverse action" under the FCRA and its construction of FCRA's notice requirements. These petitioners do not even contend that the Ninth Circuit's routine statutory interpretations conflict with any other circuit precedent or precedent of this Court. The Ninth Circuit's interpretation of the statute is straightforward and correct.

STATEMENT OF THE CASE

I. RESPONDENTS' CLAIMS OF ADVERSE ACTION UNDER THE FCRA

This case involves interpretation of two subsections of the FCRA: 15 U.S.C. §1681n(a)(1)(A), one of the FCRA's several remedy sections, and 15 U.S.C.§ 1681a(k)(1)(B)(i), the definition of an "adverse action" under the FCRA. Respondents assert claims under subsection 1681n(a)(1)(A) for petitioners' failure to give adequate notice that they took "adverse actions" against the consumers, a violation of section 15 U.S.C. § 1681m (a). The insurance companies both denied insurance and increased premiums, "adverse actions" under the FCRA, based on review of the consumers' credit information (typically "credit scores" or "insurance scores" based on confidential financial, banking and credit information.)

The FCRA, at its core, is a notice statute. *Reynolds v. Hartford Fin. Servs. Group*, 435 F.3d, 1081, 1085 (9th Cir.

2006).[1] The FCRA gives insurance companies and other users the privilege to review confidential financial information of individual consumers. *See* 15 U.S.C. § 1681b(a)(3) (authorizing credit bureaus to provide confidential consumer credit information to insurers and others). Insurance companies use that information to price insurance premiums and decide whether to offer coverage. If an insurance company takes an adverse action, such as denying insurance or increasing a premium based on a review of a consumers' credit information (*see* 15 U.S.C. § 1681a(k)(1)(B)(i)), it must give notice that it took such action. 15 U.S.C. § 1681m.

This notice serves an important purpose by allowing consumers to check their credit files to confirm that the credit information consulted was accurate. *See Reynolds*, 435 F.3d at 1085; *see also* 15 U.S.C. § 1681 (the FCRA is designed to ensure "[a]ccuracy and fairness of credit reporting."). For instance, if an insurance company offers John *Allen* Smith a higher premium because his credit score is low, he can check whether the credit information consulted was accurate. If he discovers that the insurance company mistakenly reviewed the file of John *Alan* Smith or another consumer with a slightly different social security number, he can inform the credit bureau and, ultimately, the insurer that the insurer mistakenly increased his charge based on someone else's less favorable credit information. Or the consumer may discover that the insurer based his premium on an accurate identity, but used inaccurate financial information that lowered his credit rating and resulted in an increased charge.

In the trial court, petitioners sought summary judgment on the ground that they had not taken "adverse action"

---

[1] Because *Reynolds*, the published Ninth Circuit opinion at issue, is reproduced with different pagination in each petitioner's appendix, we cite the reported opinion for simplicity *Reynolds* directly addressed the *Hartford Fire* and *GEICO* cases. The *State Farm* and *Safeco* cases were separately decided by short, unpublished memoranda citing *Reynolds*.

against respondents. Petitioners argued that when a first-time applicant for insurance is charged a higher premium because of his credit score, his premium has not been "increased"; thus, they never have to give notice of an adverse action in such circumstances and can, with impunity, use inaccurate credit information to make first-time applicants pay more for insurance. Petitioners argued that they only "increase" a premium based on credit information if they first charge a consumer a premium and later, after reviewing credit information, increase the charge (perhaps on a renewal application).

The district court initially accepted petitioners' argument, but the Ninth Circuit, relying on the statute's plain meaning, rejected it, holding that "whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA." *Reynolds,* 435 F.3d at 1092. The Ninth Circuit pointed out that petitioners' position would eviscerate the statute's purpose of providing even *initial* applicants for insurance the proper notice when they are charged more based on their credit information. *Id.* at 1092-92; 15 U.S.C. § 1681a(k)(1)(B)(i) (providing that an adverse action includes "any increase in any charge for * * * any insurance, existing or *applied for*") (emphasis added). The Ninth Circuit's straightforward statutory construction ensures, as the statute provides, that consumers (including first-time applicants) who are charged more for insurance based on their credit file receive proper notice.

II. THE NINTH CIRCUIT'S STATEMENTS WITH RESPECT TO WILLFULNESS

Except for State Farm, petitioners also argued in the alternative that, as a matter of law, they did not "willfully" violate the statute under 15 U.S.C. § 1681n(a)(1)(A). Because the district court mistakenly agreed with petitioners' primary argument, it never reached the issue of defendants willfulness under subsection 1681n(a)(1)(A) or examined any evidence of willfulness. *See e.g., Rausch v. Hartford Fin. Svcs Group,*

Inc., 2003 WL 22722061, *2, n. 1 (D. Or. Jul. 31, 2003) (the "Court does not reach the additional arguments in support of Defendants' Motion for Summary Judgment"), *rev'd on other grounds,* 435 F.3d 1081 (9th Cir. 2006).

The Ninth Circuit also did not consider the evidence of willfulness. Rather, it remanded for creation of a more complete record. *Reynolds*, 435 F.3d at 1099 ("[B]ecause the parties did not have an adequate opportunity to explore the issues in the district court, we remand for further proceedings.") Preliminarily, however, the court interpreted the statute to mean that petitioners could be found willful if a fact-finder eventually found *either* that petitioners knowingly or recklessly ignored the notice requirements of the FCRA.

III. PETITIONERS' MISSTATEMENTS AND SIGNIFICANT OMISSIONS

Petitioners' statements of the case contain significant omissions and misstatements that create the mistaken impression that the Ninth Circuit decided more than it did and that the records in these actions are more completely developed than they are. Certain developments post-dating the petitions also bear on the appropriateness of review.

Petitioners suggest either that they have been precluded from raising an advice of counsel defense or that the Ninth Circuit rejected this defense or ruled on it in ways that conflict with holdings of other circuits. However, in none of these cases is there a developed record on advice of counsel, and the Ninth Circuit did not rule on the defense. The Ninth Circuit merely made observations about the possible relevance of advice of counsel to willfulness and remanded for further proceedings. *Reynolds*, 435 F.3d at 1099. Those statements are *dicta* and not the source of any circuit conflict.

Indeed, for the last several years, petitioners made a tactical choice *not* to present a full-blown advice-of-counsel defense because they did not want to share the actual advice they received (which was almost certainly different from the

legal arguments they made to the district court and Ninth Circuit) and waive the attorney-client privilege as a result. Only on remand some petitioners recently raised the advice of counsel defense. The result may ultimately be a developed factual record and legal rulings based on it, but until then this case will not present any issues regarding advice of counsel suitable for appellate review, let alone review in this Court.

Petitioners also create the mistaken impression that these are certified class actions for punitive damages. Petitioners are wrong on both counts. Class certification issues are still before the trial court. In addition, respondents have stated on the record several times that they are not pursuing claims for punitive damages and have withdrawn those claims below or dropped them from amended complaints. Respondents repeat here that they are not seeking punitive damages. Respondents only seek the statutory damages (between $100 and $1,000) that Congress has provided for willful violations of the FCRA under subsection 1681n(a)(1)(A).

This Court also should be aware of certain developments that petitioners do not mention because they postdate the filing of the petitions. Most significantly, since the petitions were filed, petitioner Hartford Fire and respondent Reynolds have entered into a Memorandum of Understanding that settles the putative class case. While Hartford Fire has yet to withdraw its petition, it has agreed to do so once there is a class settlement finally approved by the district court.[2]

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[2] Other insurers have similarly settled the FCRA claims or chosen not to seek review of the Ninth Circuit's opinion. Nationwide Insurance Company settled an identical and related case before the Ninth Circuit even ruled on its case, for $280 per class member in statutory damages. In another appeal from a related case that the Ninth Circuit decided with these cases, Farmers Group Inc. chose not to seek *certiorari* from the Ninth Circuit's identical decision in their case. *See Ashby v. Farmers Group, Inc.*, No. 04-80084, Mem. Op. (9th Cir. Aug. 4, 2005).

REASONS FOR DENYING THE WRIT

I. THE PETITIONS ARE PREMATURE BECAUSE THEY ARISE OUT OF SUMMARY JUDGMENT, ARE BASED ON AN INCOMPLETE RECORD, AND THE FACTS ON WILLFULNESS HAVE NOT BEEN REVIEWED BY A LOWER COURT.

A. No Court Has Examined the Summary Judgment Facts on Willfulness.

It would be premature to address the meaning of willfulness in the current procedural context. These petitions arise out of summary judgment proceedings and, in the case of the *Safeco* appeal, a Fed. R. Civ. P. 54(b) judgment, and the disposition below was a remand for further proceedings in all cases. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 506 U.S. 946 (1993) (Scalia, J., respecting the denial of *certiorari*). The Court ordinarily limits its review of cases in an interlocutory posture to extraordinary circumstances, such as when it is necessary to prevent great inconvenience in the conduct of further proceedings. Robert L. Stern, et al., Supreme Court Practice § 4.18, at 258 (8th ed. 2002) (citing cases). The mere announcement of an abstract standard for willfulness to be applied at some point in the future does not cause great inconvenience or present extraordinary circumstances.

While Safeco, joined by all petitioners, contends that it presents a question of "enormous practical significance," it is difficult to believe that regulated persons are waiting for abstract guidance, without the benefit of how that guidance applies to any specific conduct, on whether they can be liable for either consciously or recklessly ignoring the FCRA. One would hope that corporations that enjoy the privilege of using consumer's personal banking information, credit information, social security information and other private data are not recklessly misusing such protected information in the hope

that recklessness will not suffice to make them liable under the statute. These are certainly not the "extraordinary circumstances" that should lead this Court to give guidance prior to a final resolution and in the absence of a well-developed record reviewed by the district court below.

Here, not only did this issue arise on summary judgment, but the lower courts have never even applied the law to any factual record. The district court decided these cases on alternative grounds and never considered the facts on willfulness. *See e.g., Rausch*, 2003 WL 22722061 at *2. The Ninth Circuit also did not decide the willfulness issue, but simply announced a general standard for willfulness to be applied on remand. *Reynolds*, 435 F.3d at 1099.

The meaning of the term "willful," as petitioners themselves point out, is abstract. This Court would provide little guidance to the lower courts if it simply announced an abstract definition without any corresponding application of that standard to a fully developed factual record. While the Ninth Circuit did its best to guide the district court by announcing a standard that could be applied to the facts on remand, the case will be in a better procedural posture, if still not a good candidate for Supreme Court review, once the factual record is developed and the district court has the opportunity to apply the standard to the facts — including the as-yet completely undeveloped record on what petitioners view as the critical issue of advice of counsel.

Indeed, there are many possibilities for these cases on remand. The district court may ultimately conclude that plaintiffs presented sufficient evidence that defendants "knowingly" violated the FCRA, providing evidence that goes beyond a reckless violation.[3] Thus, petitioners' request

[3] The Safeco petitioners boldly predict that had this case been heard in other circuits, the decision granting summary judgment would be affirmed. Safeco Pet. 16. Because the courts below never examined the evidence on willfulness under any standard, this is pure, and likely inac-

(*Footnote continued*)

for a higher standard of knowing and willful conduct may ultimately be irrelevant if the court or a jury later concludes that defendants acted *both* knowingly and recklessly.

In addition, these cases may resolve by settlement. As noted above, petitioner Hartford Fire has already entered into an initial settlement with a putative class and will withdraw its petition once it is finally approved by the district court.

B. There is No Factual Record of an Advice of Counsel Defense.

Petitioners make many misstatements about the status of the advice of counsel defense. For instance, petitioner Safeco states that "the Ninth Circuit's refusal to recognize an advice of counsel defense under § 616 rests on a presumption of bad faith on the part of lawyers and clients that is unprecedented in the decisions of this Court." Safeco Pet. 22.

No petitioner, however, properly raised the "advice of counsel" defense in its summary judgment motions, and neither the district court nor the Ninth Circuit ruled on such a defense. There is no factual record of any advice of counsel defense.[4] Indeed, having prevailed on other arguments in the trial court, petitioners did not want to raise the defense and waive their attorney-client privilege unless and until they had no other supportable defense. Far from "refusing to recog-

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curate, speculation. While the district court did not reach the issue in these cases, the same court held in the related *Nationwide* case that plaintiffs would survive summary judgment even under a "knowing" standard. *Razilov v. Nationwide Mut. Ins. Co.*, 2004 WL 3090083 (D. Or. 2004).

[4] In its summary judgment papers in the trial court, GEICO did say it had consulted counsel, but it presented no evidence of what counsel advised, the timing of the consultation in relation to the conduct, or whether GEICO followed the advice. A defendant is not entitled to an advice of counsel defense "merely because he consulted an attorney in connection with a particular transaction"; he must also show that he disclosed the material facts to counsel and received advice on which he actually relied in good faith. *United States v. Rice*, 449 F.3d 887, 896-97 (8th Cir. 2006).

nize" an advice of counsel defense, the Ninth Circuit remanded the case so that petitioners could raise the defense on remand. *Reynolds*, 435 F.3d at 1099. In fact, petitioners Safeco and GEICO have now raised the defense on remand.

C. Recent Developments Since the Filing of the Petitions Confirm That the Facts of This Case Should Be Fully Developed and Not Subject to Piecemeal Review by This Court.

Developments that have taken place since the Ninth Circuit ruled further confirm that it would be premature to review these cases because of the uncertainties that exist prior to a full trial, complete factual record, and final dispositions of these cases. Not only has Hartford Fire entered into a settlement that, once approved, will moot its case before this Court could decide it, but the Safeco petitioners have now, for the first time, raised issues about whether two of the Safeco companies are proper parties to the case. These developments illustrate that the very identities of the parties are still in flux and highlight the substantial risks attendant to granting a writ of *certiorari* at an interlocutory stage of any case. This Court should not reach out to rule until it is clear that its decision will bind the appropriate parties. Without a settled record and final judgment, the landscape on remand below is constantly changing. Indeed, the parties are continuing to litigate class, discovery and other issues to this day.

II. THERE IS NO CONFLICT ON THE MEANING OF WILLFULNESS.

Petitioners maintain that this case merits review because, they claim, there is a circuit conflict regarding the meaning of a willful violation under the FCRA. Despite the Ninth Circuit's reference to a split of authority, a careful review of the statute and case law reveals there is no well-developed circuit conflict with respect to the definition of a willful violation for the particular statutory subsection at issue here, 15 U.S.C. § 1681n(a)(1)(A). The cases that petitioners cite either (a) refer

to the *mens rea* requirements for violations of sections 1681n(a)(1)(B) or 1681n(b), which both expressly require proof of a "knowing" violation, (b) involve the issue of punitive damages under section 15 U.S.C. §1681n(a)(2), or (c) otherwise do not analyze the particular statutory language at issue here. Moreover, the great majority of the cases petitioners cite do not expressly address the issue of "reckless disregard" at all, belying petitioners' claims of a mature conflict among the circuits over that specific issue.

A. The Ninth Circuit's Statutory Interpretation Is Firmly Grounded in the Statutory Language

Before turning to the claimed circuit conflict, respondents briefly review the statutory language. The claimed conflict largely disappears when it is understood that the FCRA has several different remedial subsections under the FCRA.[5]

Respondents' claims arise under 15 U.S.C. § 1681n (a)(1)(A), which provides that any person who "willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of — (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000, whichever is greater." In contrast to other FCRA sections, this subsection does not require proof of a knowing violation.

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[5] Except for State Farm, petitioners conveniently refer either to the entire section 616n of the original bill or to the codified section 1681n without addressing the several subsections with different remedial provisions and different language under 1681n. Petitioners' failure to engage in statutory analysis at the textual level of each subsection is revealing. State Farm incongruously argues that the term "willful" when used alone must mean "willful and knowing" even when Congress clearly distinguished between those distinct terms by requiring proof of only a "willful" violation for a claim under subsection 1681n(a)(1)(A), but requiring proof of both a "willful and knowing" violation in the immediately following remedial subsections of the FCRA. *See* State Farm Pet. 26-28.

The very next subsection, 1681n(a)(1)(B), provides for actual damages or at least $1,000 in statutory damages as well as punitive damages for a violation that is not only "willful" but also involves "obtaining a consumer report under false pretenses *or knowingly without a permissible purpose*" (emphasis added). Similarly, section 1681n(b) imposes liability on "any person who obtains a consumer report from a consumer reporting agency under false pretenses or *knowingly without a permissible purpose*" (emphasis added). In addition, Congress provided criminal liability under section 1681q for "any person who *knowingly and willfully* obtains information on a consumer * * * under false pretenses." 15 U.S.C. § 1681q (emphasis added). The references to willful *and* knowing violations would be superfluous if the definition of willful already required knowingly wrongful conduct.

Congress plainly understood that a merely willful violation requires something less than proof of a willful *and* knowing violation because it expressly required proof of a knowing violation or of both a "willful and knowing" violation in other civil and criminal subsections. When Congress wanted to require proof of a knowing violation of FCRA, it knew how to do so. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (stating that Congress "says in a statute what it means and means in a statute what it says there.") With respect to section 1681n(a)(1)(A), it did not. *See United Dominion Indus. Inc. v. United States*, 532 U.S. 822, 836 (2001) (noting the logic of investing significance in a notable omission of words in determining Congressional intent). Thus, the Ninth Circuit's conclusion that a willful violation does not require proof of a knowing violation is fully consistent with standard statutory interpretation.

Petitioners contend that the legislative history demonstrates that the Ninth Circuit's definition of willfulness is incorrect. But because the statutory text is clear, there is no need to consult legislative history. *Department of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, 132-33 (2002).

Even if this Court were interested in legislative history, petitioners fail to cite the most directly relevant indication in that history of Congress's understanding of the meaning of "willful" conduct. In an early version of 15 U.S.C. 1681q, Congress provided criminal liability for "whoever willfully violates any provision" of the FCRA. H.R. 19410, 91st Cong., Sec. 62 (1970). Congress eventually added a "knowing and willful" criminal *mens rea*, indicating that Congress understood "willful" to mean something less than "knowing and willful" for purposes of this statute. The statute's evolution thus confirms the Ninth Circuit's interpretation of the text.

Given the language and history of the statute, the Ninth Circuit's conclusion that "willfulness" under subsection 1681n(a)(1)(A) incorporates both knowing and reckless disregard of a defendant's legal obligations is fully consistent with this Court's construction of "willfulness" in statutes dating back to the 1930s. *See Reynolds*, 435 F.3d at 1098; *see, e.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (a willful violation of the Age Discrimination in Employment Act requires only a "reckless disregard for the matter of whether its conduct was prohibited"); *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988) (stating same knowing or reckless standard); *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 242-43 (1938) (holding that civil defendant's conduct was "willful" because it showed disregard for statute and indifference to its requirements). The standard statutory definition for willful (where willful is not more specifically defined in the statute) has been settled in this Court for decades and does not need revisiting.[6]

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[6] State Farm mistakenly relies on *Kawahaauhau v. Geiger*, 523 U.S. 57, 60 (1998), in which this Court was interpreting the meaning of the bankruptcy statutes that excepts "willful and malicious injury" from bankruptcy discharge. The statute here does not require the additional element of a "malicious" injury

B. There Is No Circuit Conflict with Respect to 15 U.S.C. § 1681n(a)(1)(A).

1. The other circuits do not address the particular language of Section 1681n(a)(1)(A).

Turning to the claimed circuit conflict, a close look at the cited opinions reveals there is no direct conflict with respect to the interpretation of the text of the particular statutory subsection, 15 U.S.C. § 1681n(a)(1)(A), at issue here. In *Phillips v. Grendahl*, 312 F.3d 357, 365 (8th Cir. 2002), the only case cited by petitioners that explicitly criticizes the use of a "reckless disregard" standard under any subsection of the FCRA, the Eighth Circuit noted that the plaintiff had not clearly alleged which statutory subsection the defendant violated, but ultimately concluded that the plaintiff was alleging a violation of section 1681n(a)(1)(B), which, as noted above, expressly requires proof of obtaining a consumer report not only "willfully," but also "under false pretenses or knowingly without a permissible purpose."

Similarly, in *Duncan v. Handmaker*, 149 F.3d 424, 426 (6th Cir. 1998), the plaintiff "sought to hold defendants civilly liable for procuring the [plaintiffs'] consumer reports under false pretenses." The Sixth Circuit noted that plaintiffs invoked a prior version of the statute that provided civil liability for violation of the criminal section, 1681q, "which criminalizes the act of knowingly and willfully obtaining information under false pretenses." 149 F.3d at 426, n 1. Several other circuits also specifically analyze 15 U.S.C. § 1681q, which "imposes criminal liability upon any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses." *Zamora v. Valley Fed. Sav. & Loan Ass'n of Grand Junction*, 811 F.2d 1368, 1370 (10th Cir. 1987). *See also Bakker v. McKinnon*, 152 F.3d 1007, 1010 (8th Cir. 1998) (analyzing a claim for a violation of section 1681(q)); *Yohay v. City of Alexandria Employees Credit Union*, 827 F.2d 967, 971-72 (4th Cir. 1987) (analyzing knowing or false pretense

standard under section 1681q).[7] These circuits' requirement of proof of a knowing violation under a different statutory subsection, 1681q, are consistent with the Ninth Circuit's interpretation of subsection 1681n(a)(1)(A).

The remaining cases relied upon by petitioners fail to interpret the particular text of subsection 1681n(a)(1)(A) or broadly refer to Section 1681n without any substantive textual analysis. *See Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 417-418 (4th Cir. 2001) (citing generally section 1681n and 1681o and failing to address the specific statutory language); *Ausherman v. Bank of America Corp.*, 352 F.3d 896, 900 (4th Cir. 2003) (following *Dalton* without textual analysis); *Wantz v. Experian Info. Solutions*, 386 F.3d 829, 833 (7th Cir. 2004) (citing generally section 1681n and stating only that proof of punitive damages requires proof of a knowing and intentional violation); *Ruffin-Thompkins v. Experian Info. Solutions*, 422 F.3d 603, 610 (7th Cir. 2005) (citing *Wantz* and section 1681n generally); *Bagby v. Experian Info. Solutions*, 162 Fed. Appx. 600, 605 (7th Cir. 2006) (same); *Stevenson v. TRW, Inc.*, 987 F.2d 288, 293-94 (5th Cir. 1993) (generally referring to "[s]ection 1681n [which] authorizes the court to award actual damages, punitive damages and reasonable attorney fees * * *.") Moreover, in none of these cases did the courts specifically address the question of "reckless disregard" as an avenue of proving willfulness, let alone reject it.

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[7] Petitioners also claim that the Ninth Circuit's opinions conflict with an unpublished Ninth Circuit opinion, *Arriola v. Safeco*, 1993 WL 530480 (9th Cir. 1993). Intra-circuit conflicts are generally not a ground for certiorari, and because *Arriola* is non-precedential, there is no intra-circuit conflict in any event. Moreover, petitioners made this same argument to no avail when requesting that the Ninth Circuit rehear these cases *en banc*. *Arriola* involved the criminal liability section 1681q which requires proof of both a willful and knowing violation. *Arriola*, 1993 WL 530480, *1. Likely recognizing the absence of any conflict, the Ninth Circuit denied *en banc* rehearing in all cases.

Further, a number of the circuits that discuss a willful violation of section 1681n, even if vaguely and without analysis of the statutory language of the particular subsections, do so in the context of resolving a claim for punitive damages under section 1681n(a)(2). The Fourth and Fifth Circuits (and a number of later cases) expressly rely on an earlier Fifth Circuit case, *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986), *cert. denied*, 483 U.S. 1022 (1987). *See Dalton*, 257 F.3d at 418 (quoting *Pinner*); *Stevenson*, 987 F.2d at 293-94 (quoting and relying on *Pinner*); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001) (quoting *Pinner* in case involving jury award of $4.47 million for willful violation). *See also Northrop v. Simsbury, Inc.*, 12 Fed. Appx. 44, 50 (2d Cir. 2001) (failing to analyze statutory text and reviewing claim for punitive damages based on willful violation); *Casella v. Equifax Credit Info. Svc's*, 56 F.3d 469, 476 (2d Cir. 1995) (same), *cert. denied*, 517 U.S. 1150 (1996); *Sapia v. Regency Motors of Metairie, Inc.*, 276 F.3d 747, 753 (5th Cir. 2002) (analyzing punitive damages); *Wantz*, 386 F.2d at 833 (same). In *Pinner*, the definition of willfulness adopted by the court was based on the requirements for proof of punitive damages under section 1681n(a)(2). The court focused on whether the jury had sufficient evidence to award punitive damages:

> 'Willful' is a word of many meanings — its construction often influenced by its context. But here, there is simply nothing to even suggest that [defendants] willfully set out to do Pinner harm. There is no evidence that they knowingly and intentionally committed an act in conscious disregard for the rights of others. The jury's award of punitive damages lacked any evidentiary support whatsoever.

805 F.2d at 1263. Unlike *Pinner* and its progeny, the cases at issue do not involve any claim for punitive damages as respondents, plaintiffs below, seek only statutory damages.

We have no quarrel with *Pinner*. The meaning of willful is often influenced by context. As State Farm argues, this Court has examined statutory terms such as willful "both in the immediate context in which it is used and the context of provisions in which it is embedded." *See* State Farm Pet. 24 (citing *Bryan v. United States*, 524 U.S. 184, 191 (1998)). Indeed, in *Bryan*, this Court noted that a willful *mens rea* may include "careless disregard" for the rights of others. 524 U.S. at 191, n. 12. Here, Section 1681n(a)(1)(A)'s use of the term "willful," without reference to knowledge, means something less than a knowing violation in the context of the "other provisions in which it is embedded," which include Congress's express requirement of proof of a "knowing and willful" violation under sections 1681q and 1681n(a)(1)(B).

2. The Ninth Circuit's definition of willful is consistent with other circuits' definitions.

The Ninth Circuit's definition of a willful violation under section 1681n(a)(1)(A) expressly relies upon and is entirely consistent with the Third Circuit's definition. *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226-27 (3d Cir. 1997).[8] In *Cushman*, the Third Circuit noted that plaintiff could prove her FCRA violation if she proved either that the defendant credit reporting agency took action "knowing that policy to be in contravention of the rights possessed by consumers or in reckless disregard of whether the policy contravened those rights." *Id.* at 227. This is the same standard expressly adopted by the Ninth Circuit. *Reynolds*, 435 F.3d at 1097. Petitioner Safeco incredibly tries to create a circuit conflict out of whole cloth by claiming that even the Third Circuit's interpretation in "*Cushman* cannot plausibly be said to hold that 'reckless disregard' satisfies the 'willfulness' standard under § 616." Safeco Pet. 17, n 7. On the contrary, the Third

[8] *Cushman* itself involves punitive damages and does not directly address the specific issue in this case, liability under § 1681n(a)(1)(A).

Circuit's express holding that proof of "reckless disregard" satisfies the statute cannot be read any other way. Significantly, in light of petitioners' assertion of a raging conflict over this issue, *Cushman* has not been rejected, criticized, or even distinguished by any other court of appeals in a case under section 1681n (a)(1)(A) in the nearly ten years since the case was decided; indeed, the decision below and *Phillips*, which addressed a claim under section 1681n(a)(1)(B), appear to be the only appellate decisions ever to have discussed *Cushman's* recklessness holding.

Moreover, the Third Circuit's interchangeable use of the terms "conscious disregard" and "reckless disregard" indicates that the Circuits do not find these terms significantly different. *Cushman*, 115 F.3d at 226-227 (citing *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996), and *Pinner*, 805 F.2d at 1263). Similarly, the Ninth Circuit expressly held that the willfulness standard involves "'a conscious disregard' of the law, which means either 'knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *Reynolds*, 435 F.2d at 1098, *quoting Cushman*, 115 F.3d at 227. Except for *Phillips*, which involved subsection 1681n(a)(1)(B), petitioners cite no court that has expressly disagreed with the Ninth and Third Circuits and held that "conscious disregard" and "reckless disregard" are mutually exclusive under this statute, and thus opinions that merely mention "conscious disregard" cannot be interpreted as conflicting with the decision below (or with *Cushman*).

C. The State Farm Petitioners Did Not Raise the "Willfulness" Issue Below and Cannot for the First Time Before This Court.

State Farm acknowledges that the willfulness issue was not decided below in its case, but still contends that it may raise that issue solely because the Ninth Circuit based its unpublished *State Farm* opinion on its resolution of *other* issues

in its published *Reynolds* opinion. State Farm Pet. 29 n.15. State Farm contends that *every* issue raised in *Reynolds*, including willfulness, is therefore a proper issue for review in *State Farm*. That is not the law. State Farm argued to the Ninth Circuit only that (1) State Farm Fire did not take an "adverse action" against respondent Willes and (2) State Farm Mutual did not reject Willes's application because, according to State Farm, she only applied to State Farm Fire. *See* State Farm Appellees' Br. 2 (Issues Presented for Review). State Farm did not argue willfulness in its brief, and its petition does not even claim it did,[9] nor did the Ninth Circuit mention willfulness in its *State Farm* memorandum. Having neither been raised nor decided below, the issue is not properly before this Court in the State Farm petition. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148, n. 2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

D. The Ninth Circuit Did Not Resolve Any Advice of Counsel Defenses.

Having failed to create a credible circuit split on the definition of "willful" for the purposes of Section 1681n(a)(1)(B), petitioners try to redefine the Ninth Circuit's standard as a mere negligence standard through their discussion of a red-herring issue — the *potential* "advice of counsel" defense for which there is no factual record.

Because the Ninth Circuit did not rule on the advice of counsel defense, its observations about the subject are *dicta* and could not form the basis for any claim of a circuit split. Even as *dicta*, the Ninth Circuit's observations are not "extreme," as petitioners suggest. The Ninth Circuit merely stated that "neither a deliberate failure to determine the ex-

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[9] State Farm belatedly raised the issue when seeking *en banc* rehearing, which the court denied in *State Farm* without reaching this issue.

tent of its obligations nor reliance on creative lawyering that provides indefensible answers will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement." *Reynolds*, 435 F.3d at 1099. The Ninth Circuit's view is entirely consistent with the settled principle that an advice of counsel defense cannot prevail if the defendant did not honestly believe the advice received was proper but instead had "reason to doubt" it. *United States v. Mathes*, 151 F.3d 251, 255 (5th Cir. 1998), *cert denied*, 525 U.S. 1059 (1998) (citation omitted). A blatant inconsistency between the purported advice and the clear terms of a statute would clearly be a relevant consideration in assessing such a defense. Petitioners pull out of context individual words such as "unreasonable" to create the impression that the Ninth Circuit adopted a negligence standard, when the Ninth Circuit was only guiding the district court to look at the extent of "the obviousness or unreasonableness of the erroneous interpretation." *Reynolds*, 435 F.3d at 1099. Indeed, the Ninth Circuit expressly rejected a negligence standard. 435 F.3d at 1097-98 (citing *McLauglin*, 486 U.S. at 133 (noting that willful conduct is not merely negligent)).

Rather than credibly arguing that this *dicta* somehow creates a conflict in the law, petitioners favor sweeping statements of hyperbole that the Ninth Circuit has somehow prejudged the evidence. To that end, State Farm argues:

> Under the Ninth Circuit's decision, factors that normally favor a finding of an absence of willfulness and/or recklessness as a matter of law are turned on their heads, all in service of a jaundiced and unsupported view of how business and companies formulate their conduct in regulatory and compliance contexts and how lawyers view their obligations to their clients and the legal system.

State Farm Pet. 29. The purportedly skewed "factors" (actually standard and neutral tests for proving willful misconduct) do not prejudge the conduct of petitioners or their at-

torneys because the Ninth Circuit did not reach the evidence, much less find that petitioners acted willfully "as a matter of law." The court reached no conclusion as to how petitioners' lawyers "view[ed] their obligations to their clients and the legal system," precisely because petitioners have not yet offered any evidence of their lawyers' advice. Indeed, for all we know, their lawyers may have given proper direction on how to follow the law, which petitioners disregarded.

The Ninth Circuit's *dicta* concerning advice of counsel is also not in conflict with *Thurston*, 469 U.S. at 128. In *Thurston*, this Court concluded that the defendants had not willfully violated the ADEA because defendants had offered evidence that they had consulted with their attorneys in *good faith* to determine if a retirement policy in a massive collective bargaining was proper. *Thurston* expressly held that "the record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA." 469 U.S. at 129. Here, by contrast, there is no record of any petitioner's consultations with attorneys (whether in good faith or not), and the Ninth Circuit stated, consistently with *Thurston*, that "[a] company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous interpretation of the statute." 435 F.3d at 1099.

Petitioners also contend, without record support, that the after-the-fact legal *arguments* they made to the district court and the Ninth Circuit reflected the same legal *advice* on how to comply with the FCRA that they received from counsel at the time of the conduct giving rise to the violations, and they leap from that unfounded factual premise to the conclusion that their reliance on counsel could not have been reckless or even unreasonable simply because the district court later erroneously accepted their interpretation of "adverse action" under FCRA (an interpretation held by the Ninth Circuit to

be contrary to the plain meaning of the Act). As support for this argument, and to suggest a conflict with decisions of this Court, petitioners cite *Professional Real Estate Investors v. Columbia Pictures Ass'n*, 508 U.S. 49 (1993) ("*PREI*"), which they say holds that a legal position accepted by a district court cannot, as a matter of law, be unreasonable.

PREI, however, has no bearing on this case. *PREI* concerns the "sham" exception to antitrust immunity and holds only that judicial findings that a litigant has objectively reasonable grounds for litigating preclude a finding that the litigation was a sham. More generally, the *PREI* Court observed, in a footnote cited by petitioners, that a "winning lawsuit" cannot be objectively unreasonable. *Id.* at 57 n.5. But litigation in which a party's arguments are rejected on appeal can hardly be termed "winning." Nowhere does *PREI* or any other case cited by petitioners hold that an after-the-fact argument raised in litigation in defense to a statutory violation provides an absolute advice of counsel defense as long as a district court initially (but erroneously) agrees with the argument. Indeed, legal advice received after the conduct cannot support a defense of lack of willfulness. *Critikon, Inc. v. Becton Dickinson Vascular Access, Inc.*, 120 F.3d 1253, 1259 (Fed Cir. 1997), *cert denied*, 523 U.S. 1071 (1998).

Petitioners also cannot cite a single case holding that a defendant cannot be liable *as a matter of law* for a willful violation on an issue of first impression, particularly where, as here, the statute is unambiguous on its face, and there is evidence that petitioners were instructed on how to comply with the statute by specific FTC advisories, understood they had to comply, and had notice from prior case law that discussed the issue without definitively deciding it.[10]

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[10] *See e.g.*, FTC "Prescribed Notice of User Responsibilities," 16 C.F.R. Pt. 601, App. C (stating in July 1997 that "adverse actions include all business, credit, and employment actions affecting consumers that can be considered to have a negative impact * * *"); March 1, 2000 letter

(*Footnote continued*)

In *Reich v. Gateway Press*, 13 F.3d 685, 701 (3d Cir. 1994), relied upon by petitioners, the Third Circuit affirmed the district court's conclusion that there was evidence that the defendant reasonably believed it was complying with the law and, therefore, was not willful. While the court noted that this was an issue of first impression and considered that a factor in determining willfulness, it did not hold that a defendant can never willfully violate a statute unless that statute has been previously interpreted. Such a sweeping conclusion would give all regulated persons the right to violate any statute with impunity until it has first been interpreted by a court. There is no case so holding and no conflict in either this Court's or the court of appeal's case law on this point.[11]

Finally, the evidence below, though not fully developed, indicated that petitioners' legal arguments in this litigation were directly contrary to their understanding at the time of their conduct. For instance, petitioner Hartford Fire argued to

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from FTC's Hannah Stires to James Ball (providing notice to insurance companies in March 2000 that failing to offer best price or discount in response to initial application for insurance was adverse action); FTC Notice, "Consumer Reports: What Insurers Need to Know" (stating in October 1998 that adverse action occurs when initial applicant denied coverage at standard rates). *See also Mick v. Level Propane Gasses, Inc.*, 1999 WL 33453772 (S.D. Ohio 1999) (stating in the context of a class action decision that offering an initial applicant less favorable credit terms based on credit information may be adverse action under FCRA).

[11] *Stevenson v. TRW, Inc.*, 987 F.2d at 296, notes that the defendant did not have prior guidance that its notice of consumer rights was deficient, but it does not hold that the statute had to be interpreted by a court first. In *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir. 1995), the court exercised its discretion to deny punitive damages where prior maritime law decisions provided no specific guidance to the defendant. In *Whitfield v. City of Knoxville*, 756 F.2d 455, 463-64 (6th Cir. 1985), the court held that a defendants' reliance on certain appellate rulings was reasonable in light of a circuit-split that had not been resolved. None of these fact-bound decisions holds that a defendant cannot, as a matter of law, willfully violate a statute that has not been interpreted.

the district court and the Ninth Circuit that "an insurer does not take 'adverse action,' ... when the insurer charges a specific insured an initial premium on a new policy that is higher than the best rate available." Hartford Resp. Br. 9. However, *at the time of the conduct at issue*, Hartford Fire instructed its agents that "[t]he FCRA, which is applicable in all states, requires an adverse action notice for consumers not receiving our best rate."[12] The record on review does not support petitioners' unsupported assumption that the after-the-fact legal arguments that they made below necessarily reflected their subjective understanding at the time they violated the FCRA.

III. THIS CASE LIKELY WILL NOT HAVE WIDESPREAD IMPACT IN LIGHT OF DECISIONS HOLDING THAT A RECENT FCRA AMENDMENT HAS PROSPECTIVELY ELIMINATED THE CLAIMS ASSERTED HERE.

Contrary to petitioners' predictions, there is substantial doubt that these cases will have major ongoing impact in light of recent decisions holding there is no longer a private civil right of action under section 1681n for violations of section 1681m, the "adverse action" notice requirement. Petitioners fail to inform this Court that at least eleven courts, including the Seventh Circuit and several district courts within the Ninth Circuit, have held that a 2003 amendment to the FCRA, the Fair and Accurate Credit Transactions Act (FACTA), eliminated private rights of action for violations of 15 U.S.C. § 1681m that postdate FACTA. *See* 15 U.S.C. 1681m(h)(8)(A) (stating that section 1681n shall not apply to violations of this section and providing exclusive enforcement by federal agencies); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 950 (7th Cir. 2006); *Putkowski v. Irwin Home*

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[12] Attached to Appellants' Response to Appellees' Second Amended Petition for Rehearing *En Banc*, *Reynolds v. Hartford Fire*, Ninth Circuit Case No. 03-35695.

Equity Corp., 423 F.Supp. 2d 1053, 1061-62 (N.D. Cal. 2006); *Phillips v. New Century Fin. Corp.*, 2006 WL 517653, *3-4 (C.D. Cal. Mar. 1, 2006); *White v. E-Loan, Inc.*, 409 F. Supp. 2d 1183, 1187 (N.D. Cal. 2006); *Harris v. Fletcher Chrysler Prods.*, 2006 WL 279030, *3 (S.D. Ind. Feb. 2, 2006); *Stavroff v. Gurley Leep Dodge*, 413 F. Supp. 2d 962, 967 (N.D. Ind. 2006); *Murray v. Household Bank (SB),* 386 F. Supp. 2d 993, 999 (N.D. Ill. 2005); *Bonner v. Home123 Corp.*, 2006 WL 1518974, *5 (N.D. Ind. May 25, 2006) ("*Bonner I*"); *Bonner v. CorTrust Bank*, 2006 WL 1980183, *3 (N.D. Ind. July 12, 2006) ("*Bonner II*"); *Crowder v. PMI Mortgage Ins. Co.*, 2006 WL 1528608, *2-5 (M.D. Ala. May 26, 2006); *Cavin v. Home Loan Ctr,* 2006 WL 1313191 (N.D. Ill. May 10, 2006); *but see Barnette v. Brook Road*, 429 F. Supp. 2d 741, 748 (E.D. Va. 2006) (rejected in *Bonner I*, *Crowder*, *Bonner II*, and *Cavin*).

As the Seventh Circuit explained in *Murray*:

> A recent amendment to the Act abolishes private remedies for violations of the clear-disclosure requirement, which in the future will be enforced administratively, but that change does not apply to offers made before its effective date and thus does not affect this litigation. See 117 Stat.1952, adding 15 U.S.C. § 1681m (h)(8).

434 F.3d at 950. Respondents take no position about the correctness of these decisions, but they at least cast serious doubt on petitioners' assertion that the Ninth Circuit's decision will unleash a flood of new litigation under the FCRA.

While petitioners fail to mention these cases, they provide vague, misleading and incomplete citations to recently filed cases that are intended to give this Court the mistaken impression that there has been an explosion of litigation under section 1681n(a)(1)(A) as a result of the Ninth Circuit's ruling. Petitioners' purported support for such groundless claims is merely a reference to dockets of cases in which plaintiffs purportedly included a claim under section 1681n of the FCRA without identifying which subsection is at issue.

Safeco Pet. 13, n.5; Hartford Pet. 23. These references fail to demonstrate any connection between the Ninth Circuit's opinion and the recently filed cases. Undoubtedly, there have been many cases filed under the FCRA in federal courts for over thirty years because the statute regulates many different entities, including, most comprehensively, the credit bureaus that provide credit information. Petitioners' attempt to attribute an increase in litigation to the Ninth Circuit's opinion is pure speculation. As noted above, it is more likely that there has been or will be a decline in the filing of these types of cases because the courts have held that the claims at issue here have been eliminated by the FACTA.

IV. PETITIONERS' REMAINING CHALLENGES TO THE NINTH CIRCUIT'S RULING ON "ADVERSE ACTION" UNDER THE FCRA DO NOT MERIT REVIEW.

State Farm and GEICO also seek review of the Ninth Circuit's interpretation of "adverse action" under the FCRA. Neither State Farm nor GEICO contends that the Ninth Circuit's statutory interpretation conflicts with the law of this Court or any other circuit. As the Ninth Circuit correctly noted, no other circuit has addressed the definition of "adverse action" under section 1681a(k)(1)(B)(i). *Reynolds*, 435 F.3d at 1091. Moreover, the Ninth Circuit's interpretation is consistent with the Sixth Circuit's interpretation of a similar notice provision in the Truth in Lending Act ("TILA"). *See Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir. 2001) (holding TILA's notice requirements are triggered when a credit customer is charged more than he otherwise would have been if he had paid in cash). State Farm and GEICO do not provide any "compelling reasons" for review. Their arguments are solely directed at correction of a supposed error and without merit in any event.

A. State Farm Misinterprets the Statute.

The FCRA provides that an insurance company must give notice if it takes an adverse action against any consumer "based in whole or part on any information contained in a consumer report." 15 U.S.C. § 1681m (a). The definition of "adverse action" includes "an increase in any charge, or a reduction or other unfavorable change in the terms of * * * any insurance, *existing or applied for* in connection with the underwriting of insurance" 15 U.S.C. § 1681a(k)(1)(B) (emphasis added). Thus, the definition includes an increase in either a renewal or an *initial* applicant's charge for insurance. Eviscerating FCRA's purpose of providing notice when consumers are charged more based on the review of their private credit information, the district court held that an increase could only occur if an applicant initially applied for insurance, received a premium quote, and then that initial quote was later increased based on the applicant's credit information. State Farm continues to assert this position on review.

As the FTC made clear in an amicus brief before the Ninth Circuit on this narrow issue, "[t]his is absurd since it assumes that an insurer would make a formal offer of insurance to a consumer and then, after making that offer, would evaluate the consumer's insurability." FTC Amicus Br. 14 (filed in Ninth Circuit in *Willes v. State Farm*, Case No. 03-35848). The Ninth Circuit agreed and correctly held that an increase occurs when the consumer is charged more for insurance "based in whole or part" on credit information — in other words, the consumer is entitled to notice if she would have received a lower rate if she had a better qualifying credit score or other relevant credit information. *Reynolds*, 435 F.3d at 1093.[13] This holding is not radical. Indeed, this is

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[13] State Farm misleadingly states that the Ninth Circuit requires notice to everyone who does not have "perfect credit." State Farm Pet. 18. That is not the standard. The insurance companies themselves set the credit scores at which consumers will be charged more for insurance, and

(*Footnote continued*)

the understanding that petitioner Hartford Fire, and likely all petitioners, had when it instructed its agents that "[t]he FCRA, which is applicable in all states, requires an adverse action notice for consumers *not receiving our best rate*." *See* footnote 12, *supra*. It is also the position that the FTC staff, well before this lawsuit, had taken for years based on a plain reading of the statute. *See* footnote 10, *supra*. A contrary rule would permit insurance companies to increase rates charged millions of consumers for insurance, perhaps based on inaccurate information, without giving consumers any notice or opportunity to confirm that their rates were being increased based on accurate information. *Reynolds*, 435 F.3d at 1092.[14]

B. The GEICO Petitioners Misstate the Ninth Circuit's Holding.

In an attempt to make the Ninth Circuit's straightforward statutory interpretation appear extreme, the GEICO petitioners simply misrepresent it. The GEICO petitioners argue that the Ninth Circuit's ruling requires that insurance companies give notice to consumers "even though their credit informa-

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do not require a perfect score for the best-rate. Thus, if an insurance company charges anyone who has a credit score under 700 (on a scale of 850) more for their insurance, only those consumers are entitled to notice.

[14] State Farm also contends that the Ninth Circuit erred in holding one of its companies, State Farm Mutual, could be liable under FCRA, because, it asserts, respondent Willes only applied to State Farm Fire. In *Reynolds*, the Ninth Circuit, relying on the plain language of FCRA making "any person" who takes an adverse action liable for a failure to give notice, 15 U.S.C. § 1681m (a), held that when an insured seeks insurance from a family of companies, and when each of them might have offered insurance depending on the applicant's credit score, each company may be liable for violating FCRA's notice requirements if an adverse action (premium increase or denial of insurance) is not disclosed. 435 F.3d at 1095-97. The court applied this ruling in *State Farm*, holding that because State Farm Mutual denied Ms. Willes a policy because her credit score was not higher, it could be liable under FCRA. State Farm does not contend that this common-sense, fact-bound ruling is in conflict with any other appellate decisions. The issue plainly does not merit review.

tion had either no impact or a favorable impact on the rates or terms provided." GEICO Pet. 25. The Ninth Circuit actually held just the opposite: that notice is only required if a "consumer pays a higher rate because his credit rating is less than the top potential score." *Reynolds*, 435 F.3d at 1093. That is, the consumer is only entitled to notice when his premium is increased above what it would have otherwise been "based in whole or in part" on a review of his credit information." 15 U.S.C. § 1681m(a). In any event, GEICO's incorrect contention that Edo somehow benefited from GEICO's review of his credit information, which resulted in a higher charge, is truly a quarrel with the Ninth Circuit' application of law to fact, and not an issue meriting review here.

C. The Ninth Circuit's Opinion Does Not Impose New Notice Requirements Under the FCRA.

Finally, Hartford Fire, in an argument presented as an afterthought, contends that the Ninth Circuit imposed new notice requirements on insurers. It did not. The Ninth Circuit's ruling on the adequacy of Hartford's notices was based simply on the fact that "[t]hey did not tell [the insured] that any adverse action had been taken against him" and thus did not comply with a bedrock requirement on the face of the statute. *Reynolds*, 435 F.3d at 1095. The Ninth Circuit's further descriptions of the statutory notice requirements are *dicta* that merely restate and explain in plain English the notice requirements set forth in section 1681m(a) of the FCRA. Hartford Fire does not contend, and cannot, that there is any circuit conflict on this issue, any conflict with the precedents of this Court, or any other proper reasons why this is an issue worthy of this Court's review. In any event, because the Hartford petitioners are settling, there is no need to resolve the issue in this case.

CONCLUSION

For the reasons stated above, the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and STATE FARM FIRE AND CASUALTY COMPANY,

Petitioners,

v.

JULIE WILLES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *ii* of their Petition for a Writ of Certiorari, and there are no amendments to that statement.

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ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO THE MEANING OF "WILLFUL" UNDER SECTION 1681n OF THE FCRA

A. The Ninth Circuit's Decision Directly Conflicts with Decisions by Other Circuits

Plaintiff asserts that there is no conflict among the Circuits as to the meaning of the statutory term "willfully" in section 1681n(a) of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681n(a). Plaintiff is wrong: the Ninth Circuit specifically acknowledged that its ruling that willfulness under section 1681n(a) encompasses reckless disregard directly conflicts with decisions by other Circuits holding that willfulness requires a knowing and intentional violation of the statute. *See* Pet. App. at 54 n.17. This conflict among the Circuits is clear and significant and warrants immediate resolution by this Court.

Plaintiff claims that there is no conflict because the conflicting decisions cited by State Farm address different paragraphs and subparagraphs of section 1681n(a). Opp. at 15-18. In fact, all of the conflicting decisions address precisely the same statutory language, namely the general language of section 1681n(a), which introduces and is grammatically completed by the following paragraphs and subparagraphs. That language – "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of" – and its use of the word "willfully" is the language at issue in both the Ninth Circuit's decision and the conflicting decisions of other Circuits cited by State Farm. The paragraphs and subparagraphs that follow this language merely set forth the kinds of damages (actual, statutory, punitive and attorney's fees) to which a plaintiff may be entitled, provided that the plaintiff proves a willful failure to comply. Contrary to Plaintiff's contentions, the fact that the cases involve claims for damages under different subparagraphs does not negate the clear conflict as to the

meaning of the word "willfully."

Thus, Plaintiff's contention (Opp. at 15) that the Ninth Circuit's decision does not conflict with the Eighth Circuit's decision in *Phillips v. Grendahl*, 312 F.3d 357 (8th Cir. 2002), because the plaintiff in that case was alleging a claim for damages under subparagraph (B) of section 1681n(a)(1), while Plaintiff here is alleging claims for damages under subparagraph (A), is meritless.[1] The two decisions address the meaning of the word "willfully" as used in the introductory language under section 1681n(a) and reach directly conflicting conclusions. As the Ninth Circuit acknowledges, it has defined "willfulness" to encompass "reckless disregard," whereas the Eighth Circuit "has rejected the reckless disregard standard" and "'requires knowing and intentional commission of an act the defendant knows to violate the law.'" Pet. App. at 53-54 & n.17 (quoting *Phillips*, 312 F.3d at 370).

Equally meritless are Plaintiff's attempts to minimize the clear conflict between the Ninth Circuit's decision and the decisions by the Second, Fourth, Fifth, and Seventh Circuits cited by State Farm. *See* Pet. at 21-22. Plaintiff contends that the decisions from those other Circuits address willfulness "in the context of resolving a claim for punitive damages under section 1681n(a)(2)." Opp. at 17. As with *Phillips*, those decisions also address precisely the same statutory language under section 1681n(a), which introduces and is applicable to all the paragraphs and subparagraphs under subsection (a), including paragraph (a)(2) of section 1681n, which authorizes an award of punitive damages, and subparagraph (a)(1)(A), at issue in this case, which authorizes

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[1] Likewise, Plaintiff incorrectly attempts to distinguish certain conflicting cases, including *Duncan v. Handmaker*, 149 F.3d 424 (6th Cir. 1998), as involving § 1681q of the FCRA, rather than § 1681n. *See* Opp. at 15-16. In fact, *Duncan* addresses noncompliance with the requirements of § 1681q as a "basis for civil liability under § 1681n" and states that the "knowingly and willfully" requirement of § 1681q "comports with the language of § 1681n, which imposes liability for 'willful noncompliance' with the FCRA." *Duncan*, 149 F.3d at 429. The Ninth Circuit acknowledged that its decision conflicts with Sixth Circuit's implicit requirement in *Duncan* that actual knowledge is necessary. *See* Pet. App. at 54 n.17.

statutory damages.

In short, Plaintiff's argument that there is no conflict because the cases cited by State Farm "fail to interpret the particular text of subsection 1681n(a)(1)(A)" (Opp. at 16) and Plaintiff's reference to "Section 1681n(a)(1)(A)'s use of the term 'willful'" (Opp. at 18) are inaccurate and misleading. The term "willful" (or more accurately, "willfully") does not occur in subparagraph (a)(1)(A) or in any other subparagraph or paragraph under section 1681n(a). It occurs only in the general introductory language directly under subsection (a). *See* Pet. App. at 20.

In addition, contrary to Plaintiff's contentions (Opp. at 17), when the Fifth Circuit in *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986), addressed the meaning of willfulness "under the plain language" of section 1681n, it was addressing precisely the same language addressed by the Ninth Circuit in this case – which is the sole instance of the word "willfully" in section 1681n. *See Pinner*, 805 F.2d at 1263. The fact that *Pinner* arose in the context of a punitive damages claim does not limit the relevance of its interpretation of "willfulness" under section 1681n to punitive damages cases. Moreover, the Fifth Circuit in *Pinner* did not (as Plaintiff claims) base its definition of willfulness "on the requirements for proof of punitive damages under section 1681n(a)(2)" or suggest in any way that the willfulness requirement for civil liability under section 1681n differed depending on whether the plaintiffs sought statutory damages under subparagraphs (a)(1)(A) or (B), punitive damages under paragraph (a)(2), or attorneys' fees under paragraph (a)(3). *See also Wantz v Experian Info. Solutions*, 386 F.3d 829, 833-34 (7th Cir. 2004) (addressing meaning of "willful noncompliance"); *Ausherman v. Bank of Am. Corp.*, 352 F.3d 896, 900 (4th Cir. 2003) (quoting statutory language). Furthermore, contrary to Plaintiff's contention (Opp. at 16-17), the fact that some of these cases follow established Circuit precedent as to the meaning of willful noncompliance, rather than providing a detailed statutory interpretation, does not diminish or obviate the conflict between the Circuits.

Plaintiff also incorrectly argues that there is no conflict between the Circuits because there is no significant difference

between the "conscious disregard" standard adopted by the Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, and the "reckless disregard" standard adopted by the Ninth and Third Circuits. *See* Opp. at 18-19. Both the Ninth Circuit in this case (*see* Pet. App. at 54 n.17) and the Eighth Circuit in *Phillips* make clear that the difference is significant. *See Phillips*, 312 F.3d at 368 (listing cases adopting the "conscious disregard" standard; stating that "[u]nder this formulation the defendant must commit the act that violates the Fair Credit Reporting Act with knowledge that he is committing the act and with intent to do so, and he must also be conscious that his act impinges on the rights of others"; contrasting the Third Circuit's "reckless disregard" standard in *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226-27 (3rd Cir. 1997)).

In short, the substantial and significant conflict among the Circuits as to the meaning of willfulness under the FCRA merits resolution by this Court. Moreover, in addition to the cases, including this one, to which the Ninth Circuit has made its decision in *Reynolds* directly applicable, other large putative class actions alleging claims under the FCRA are pending in other jurisdictions across the country. *See* Pet. at 22-23. Thus, the conflict to be resolved not only is "fundamental to the further conduct of" this and other cases decided in the Ninth Circuit, *see Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947), but also is central to many other litigations.

Plaintiff attempts to diminish the importance of this conflict, asserting that section 1681m of the FCRA, 15 U.S.C. § 1681m, has been amended to abolish prospectively the private right of action for failure to provide the required adverse action notice. *See* Opp. at 3, 26. Assuming that the amendment indeed has this effect (and State Farm believes it does), section 1681n will still continue to apply to numerous other types of noncompliance with the requirements of the FCRA. Accordingly, the Circuit conflict on the meaning of willfulness remains a live and significant controversy that will affect not only this case and the other cases ruled upon by the Ninth Circuit, but future litigations as well.

B. The Ninth Circuit Clearly Erred in Its Interpretation of the Statutory Term "Willful"

Plaintiff argues that certiorari should not be granted because the Ninth Circuit's statutory interpretation is "firmly grounded in the statutory language." Opp. at 12-14. Again, Plaintiff is in error. As shown in State Farm's Petition, the Ninth Circuit's extension of willfulness to include "reckless disregard" is inconsistent not only with subsection 1681n(a) as a whole, but with the structure of penalties established under the FCRA. *See* Pet. at 23-27.

Plaintiff's reliance upon cases construing other, different statutory language (Opp. at 14) does not support Plaintiff's and the Ninth Circuit's interpretation of the statutory language here. Contrary to Plaintiff's contentions, there is no "standard statutory definition for willful." Rather, as this Court has repeatedly cautioned, the word "willfully" is "'a word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan v. United States*, 524 U.S. 184, 191 (1998). Used in statutes, the word "'often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental.'" *Id.* at 191 n.12 (citation omitted). Thus, for example, in *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998), this Court looked to the specific statutory language of section 523(a)(6) of the Bankruptcy Code in rejecting an interpretation of "willful" as including "reckless" and holding that "willful" meant "deliberate or intentional."[2]

As shown in State Farm's Petition (Pet. at 25), a "reckless

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[2] Plaintiff attempts to distinguish *Kawaauhau* on the erroneous ground that the statutory language in which the word "willful" is found is different from the statutory language here. *See* Opp. at 14 n.6. State Farm cited that decision, however, as demonstrating that, contrary to Plaintiff's contentions and the Ninth Circuit's analysis, there is no fixed and established rule that the word "willful" in civil statutes includes the meaning "reckless" and that this Court has recognized, whether with regard to criminal or civil statutes, that the word "willfully" must be construed with regard to the specific statutory context. *See* Pet. at 23-24.

disregard" standard is incompatible with, *inter alia*, the language of subparagraph (a)(1)(B), which authorizes statutory damages for willfully obtaining a consumer report "knowingly without a permissible purpose." 15 U.S.C. § 1681n(a)(1)(B). Plaintiff contends that the use of the word "knowingly" in subparagraph (a)(1)(B) would be "superfluous" if the word "willfully" itself required a "knowing" violation. Opp. at 13. As such, Plaintiff argues, a "merely willful" violation "requires something less than proof of a willful and knowing violation." *Id.* To the contrary, *willfully* "obtaining a consumer report under false pretenses or knowingly without a permissible purpose" under subparagraph (a)(1)(B) clearly is a more serious violation and entails a higher degree of fault than "obtaining a consumer report . . . under false pretenses or knowingly without a permissible purpose" in a non-willful manner – a violation that is covered in 1681n(b). Thus, as used to modify "obtaining a consumer report . . . knowingly without a permissible purpose," "willful" must mean purposeful, callous, deliberate and intentional.[3] *See* Pet. at 25-27. Under established principles of statutory construction, which Plaintiff does not distinguish or dispute, "willful" must have that same meaning when read in conjunction with the other paragraphs and subparagraphs of section 1681n(a). *See* Pet. at 25-26.

In addition, Plaintiff's attempt to place "willful" noncompliance lower on the culpability scale than "knowing" noncompliance is inconsistent with the FCRA's authorization of punitive damages for willful noncompliance under section 1681n(a), and not for knowing noncompliance under section 1681n(b).[4] Moreover, the use of the term "willful" in con-

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[3] The occurrence of the phrase "knowingly and willfully" in sections 1681q and 1681r, *see* 15 U.S.C. §§ 1681q, 1681r, further confirms that "willfully" under the FCRA means deliberately and purposefully, not simply recklessly.

[4] Plaintiff erroneously contends that because she is not seeking punitive damages, the meaning of willful in relation to paragraph (a)(2) is irrelevant. *See* Opp. at 17-18. Paragraph (a)(2), however, is directly connected grammatically to the statutory language whose interpretation is at issue and elucidates the meaning of that language. *See* Pet. at 25; 15 U.S.C. 1681n(a) (Pet. App. at 20).

junction with punitive damages indicates that Congress contemplated a higher degree of fault than that urged by Plaintiff and adopted by the Ninth Circuit. As this Court has stated, punitive damages serve the same purpose as criminal penalties. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). Therefore, some of the same considerations that have prompted this Court to interpret the term "willful" in certain criminal statutes as requiring knowledge of unlawfulness, purposefulness or other heightened culpability are equally relevant here. *See, e.g., Bryan*, 524 U.S. at 193-95 (holding that with respect to conduct "that is only criminal when done 'willfully'" the defendant must have "acted with knowledge that his conduct was unlawful"; stating that when individuals are engaged in "apparently innocent" conduct, willfulness may be held to require knowledge that the conduct violated a specific statute).

C. The Issue of Willfulness Is Properly Before this Court in this Case

Plaintiff erroneously contends that the meaning of the statutory term "willfully" is not preserved for this Court's review in her case, claiming that State Farm "acknowledges that the willfulness issue was not decided below in its case." Opp. at 19. To the contrary, the issue of the legal standard to be applied to determine willfulness was decided by the Ninth Circuit in *Reynolds*, and that ruling was incorporated into its decision in this case. *See* Pet. App. at 24 (remanding "all remaining issues to the district court for consideration in light of [*Reynolds*]"). Thus, the Ninth Circuit made its ruling on willfulness equally applicable to State Farm as to the other insurance companies before the Ninth Circuit.[5] Moreover, State Farm raised the issue of willfulness in its motion for summary judgment in the district court. The fact that willfulness issues were not passed upon by the district court in this case does not affect this Court's plenary authority to

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[5] Accordingly, State Farm's petitions for rehearing in the Ninth Circuit included the issue of willfulness. In any event, given that Ms. Willes is represented by the same counsel that represented the other plaintiffs in the cases before the Ninth Circuit, and her counsel fully briefed the issue of willfulness to the Ninth Circuit, none of the concerns protected by the rules of waiver are implicated here.

review the Ninth Circuit's decision on willfulness. *See Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (ruling on issue addressed *sua sponte* by Eighth Circuit; "[a]ny issue 'pressed or passed upon below' by a federal court" "is subject to this Court's broad discretion over the questions it chooses to take on certiorari"); *United States v. Williams*, 504 U.S. 36, 41 (1992) ("'pressed or passed upon'" rule "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon").

In sum, the Ninth Circuit's decision presents a direct and substantial conflict between the Circuits regarding the statutory interpretation of the word "willfully" in section 1681n(a) of the FCRA. This Court should grant certiorari to resolve that conflict and to correct the Ninth Circuit's erroneous interpretation and application of section 1681n.

II. THE NINTH CIRCUIT'S ERRONEOUS INTERPRETATION OF THE FCRA'S DEFINITION OF "ADVERSE ACTION" WARRANTS A GRANT OF CERTIORARI

In her opposition, Plaintiff does not dispute the facts of her purchase of State Farm Fire insurance. As set forth in State Farm's Petition, Plaintiff inquired about State Farm insurance and described her driving record to a State Farm agent, received quotes for State Farm Fire auto insurance without any use of her credit information, and submitted applications for State Farm Fire insurance for her three cars. She was approved for and received State Farm Fire insurance at the quoted price. *See* Pet. at 2-4. Plaintiff's credit information (incorporated into her insurance "underwriting score") was not used until after she applied for State Farm Fire insurance. The premium charged was not changed because of her credit rating. *See id.* Had Plaintiff's insurance score been better, she might have qualified for an exception to State Farm Mutual's normal requirement that applicants for insurance not have had a recent speeding ticket. *See id.* As State Farm showed in its Petition (at 12-20), the Ninth Circuit disregarded the plain meaning of the FCRA's definition of adverse action in ruling that, under these facts, both State Farm Fire and State Farm Mutual had, based upon Plaintiff's credit

rating, "increase[d]" the "charge for insurance, existing or applied for." 15 U.S.C. § 1681a(k)(1)(B).

In her opposition, Plaintiff sidesteps the serious issues of statutory interpretation raised by the Ninth Circuit's erroneous ruling. Plaintiff provides no statutory analysis that could support a reading of the statutory language broad enough to allow the conclusion that Plaintiff "applied for" insurance with State Farm Mutual or that State Farm Fire was somehow responsible for an "increase" in the charge for Plaintiff's insurance by virtue of the fact that Plaintiff was not offered a State Farm Mutual auto policy. To the contrary, as shown in State Farm's Petition (at 13-17), the words "applied for" must refer to an actual application for insurance, not a request for quotes or an expression of interest in obtaining insurance.

Plaintiff in her opposition does not (and could not) dispute the facts that State Farm Fire's initial quote was not based on a consumer report and that the price quoted was not increased. Instead, Plaintiff quotes the irrelevant and erroneous statement from the FTC's *amicus* brief before the Ninth Circuit, that it would be "absurd" to hold that there can be no increase in a charge for an initial policy of insurance unless there had been an increase from the charge originally offered, because "it assumes that an insurer would make a formal offer of insurance to a consumer and then, after making that offer, would evaluate the consumer's insurability." Opp. at 28 (quoting Br. of FTC as *Amicus Curiae* Supporting Appellant and Urging Reversal at 14, *Willes v. State Farm Fire & Cas. Co.*, No. 03-35848 (9th Cir. Feb. 19, 2004)).

The FTC's statement shows a misunderstanding of the process by which an insurance contract is formed. A quote is not a "formal offer of insurance." Rather, the blank insurance application is the insurer's invitation to the consumer to make an offer to contract, and submission of the completed application by the consumer is an offer to contract, which the insurer after investigating the applicant may accept or decline or respond to with an offer of insurance on different terms. *See* 1A Lee R. Russ et al., *Couch on Insurance* §§ 11:1, 11:3, 13:3 (3d ed. 2005). Thus, far from being "absurd" for an insurer to evaluate the consumer's insurability after a quote is provided and the consumer completes and

submits his or her application, that is precisely the process that typically occurs – and is the process that occurred in this case. Under the statutory language, in this process, it is an insurer's decision, based upon a consumer report, to accept or deny the applied for insurance or to offer the applied for insurance on different terms or at a different price that may constitute an adverse action. In this case, however, State Farm Fire gave its original quotes without reference to any consumer report and, after accessing Plaintiff's insurance underwriting score in connection with the application process, State Farm Fire did not increase the price quoted. If in processing Plaintiff's application, State Farm Fire had increased the price quoted based upon Plaintiff's credit information, that action would fall within the definition of "adverse action" and a disclosure notice would have been required. It is that limited scenario which is contemplated under the plain meaning of the statutory language with respect to increases in the charge for insurance that has been "applied for."

The Ninth Circuit's interpretation of "adverse action" erroneously requires notice "whenever a consumer pays a higher rate because his credit rating is less than the top potential score." Pet. App. at 43. That overbroad notice requirement not only is contrary to the "ordinary or natural" meaning of the statutory language, but also undermines the statutory purposes and congressional intent that informed the careful and deliberate selection of that language.[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[6] *See, e.g., The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the Senate Commission on Banking, Housing, and Urban Affairs*, 108th Cong., 529 (2003) (testimony by Joel Winston, Associate Director, Bureau of Consumer Protection: "[W]e want to avoid a situation where in essence everyone is getting an adverse action notice because no one ever gets the absolute best rate."); *id.* at 95-96 (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection: "[I]f you give notices too widely and in too many circumstances, then it . . . . becomes something that people ignore.").

Respectfully Submitted,

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IN THE

Supreme Court of the United States

HARTFORD FIRE INSURANCE COMPANY, *Petitioner*,

v.

JASON JAY REYNOLDS, *Respondent.*

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*, *Petitioners*,

v.

CHARLES BURR, *et al.*, *Respondents.*

(captions continued on inside cover)

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE AMERICAN INSURANCE ASSOCIATION AND THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF PETITIONERS

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v.

AJENE EDO, *Respondent.*

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*, *Petitioners*,

v.

JULIE WILLES, *Respondent.*

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding, contrary to the decisions of at least seven other circuits, that a defendant may be found to have "willfully" violated the Fair Credit Reporting Act even if it did not have actual knowledge that its conduct violated the FCRA.

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INTEREST OF AMICI CURIAE[1]

The American Insurance Association (AIA) and the National Association of Mutual Insurance Companies (NAMIC) are national trade associations representing companies writing property and casualty insurance in every state and jurisdiction of the United States. Collectively, AIA and NAMIC members underwrite over $300 billion in premiums each year and provide coverage in a broad range of personal and commercial lines of business. Both amici regularly appear in judicial proceedings to inform courts about the implications of legal developments for their members. Both participated below as amici in support of Petitioners.

Review of the Ninth Circuit's interpretation of the Fair Credit Reporting Act (FCRA) is extremely important to both AIA and NAMIC. The Ninth Circuit's construction of the decades-old statute as imposing requirements on insurance companies that no court previously has recognized, and its indication that defendants might be found liable for "willfully" violating these unprecedented requirements, despite their good-faith compliance efforts, threaten members of the insurance industry with substantial and severe liability.

STATEMENT

In the 1990s, many insurers began using credit-based insurance scores—scores derived from credit report information—in underwriting and pricing personal lines of insurance. The use of such scores enables insurers to rate insurance risks more accurately and, thus, to avoid subsidization by some consumers of the higher risks presented by other consumers. The more accurate classification of risk trans-

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[1] Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party authored this brief in whole or in part. No person or entity, other than amici and their members, made any monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties.

lates into lower premiums for many consumers and increased availability of coverage.

The FCRA requires the entity that "takes any adverse action" to issue an adverse-action notice. 15 U.S.C. § 1681m(a). Each insurance company using insurance scores made a determination of what triggered its FCRA duty to provide adverse-action notices. Separate determinations made by different insurers, often on advice of counsel, resulted in various practices. Given the absence of any court decisions interpreting the FCRA's insurance adverse-action definition—15 U.S.C. § 1681a(k)(1)(B)(i)—or any binding agency regulations, insurers conformed their practices to their good-faith interpretations of the FCRA's text and any applicable state-law requirements.

Many insurers reasonably determined that the FCRA did not require adverse-action notices upon the setting of an initial charge for insurance and, accordingly, for a number of years, did not provide notices in such circumstances. Even among those insurers that did provide notices in such "initial charge" circumstances, many did not do so in the broad "best rate" circumstances apparently now required by the court of appeals. Instead, rationally, many insurers attempted to determine when their use of insurance scores—compared to not using such scores—would adversely affect the consumer and issued adverse-action notices in those circumstances. To notify a consumer that she had been adversely affected when in fact she was helped by the use of her insurance score—even if the consumer might have been helped more had her insurance score been better—would have contradicted common sense.

Many insurance-company groups operate in an economically efficient, integrated fashion, in which a separate and distinct corporate entity provides centralized insurance, financial, technological, and management services to affiliated issuing insurers through written agreements. Often, this separate corporate entity orders consumers' insurance scores and applies previously established rating criteria to determine an appropriate premium. Sometimes, a con-

sumer's rate is affected by the placement of the consumer with one of several insurer affiliates within an integrated company group (where the affiliates offer different rating levels). Amici know of no company that believed, prior to the Ninth Circuit's decision, that entities other than the affiliated insurer who issued the relevant policy (or was responsible for denying coverage for the integrated company group altogether) must issue adverse-action notices.

In 2001 and 2002, a group of consumers initiated eight putative nationwide class actions in federal district court, alleging that Petitioners' and other insurers' adverse-action notice practices contravened the FCRA's requirements.[2] The complainants did not allege that they had suffered any actual damages, which a plaintiff must show to recover for a "negligent" violation of the FCRA. 15 U.S.C. § 1681o. Instead, the complainants sought an extraordinary remedy of statutory and punitive damages under § 1681n, which states that "[a]ny person who *willfully* fails to comply with any requirement imposed under [the Act] with respect to any consumer is liable to that consumer" for statutory damages of $100 to $1000 per violation, punitive damages, and attorneys fees. 15 U.S.C. § 1681n(a) (emphasis added).

The district court, addressing questions of national first impression, concluded in one of the cases that only the insurance affiliate to whom a consumer applies can "take" an adverse action and therefore incur an obligation to issue a notice. *Willes* v. *State Farm Fire & Cas. Co.*, CV 01-1457-BR, State Farm Pet. App. 74a-75a. In another case, the district court also held that an "adverse action" does not occur when

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[2] *Ashby* v. *FICO*, CV 01-1446-BR (filed Sept. 28, 2001); *Willes* v. *State Farm Fire & Casualty*, CV 01-1457-BR (filed Oct. 1, 2001); *Spano* v. *Safeco Ins. Co. of Or.*, CV 01-1464-BR (filed Oct. 2, 2001); *Dikeman* v. *Progressive Corp.*, CV 01-01465-BR (filed Oct. 2, 2001); *Razilov* v. *AMCO Ins. Co.*, CV 01-1466-BR (filed Oct. 3, 2001); *Rausch* v. *Hartford Fin. Servs. Group*, CV 01-1529-BR (filed Oct. 16, 2001); *Mark* v. *Valley Ins. Co.*, No. CV-01-1575-BR (filed Oct. 24, 2001); *Edo* v. *GEICO Cas. Co.*, CV 02-678-BR (filed May 24, 2002).

an insurer, on the basis of information in a consumer's credit report, charges the consumer an initial rate that is higher than the best available rate. *Mark* v. *Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1318-1319 (D. Or. 2003). Based on the same reasoning, and on appropriate motions, the district court granted summary judgment to all Petitioners in these cases. At the time they were issued, the district court's decisions on these questions were the first and only reported opinions addressing the application of the FCRA's "adverse-action" notice requirement in this insurance context. *See id; Spano* v. *SAFECO Ins. Co.*, 215 F.R.D. 601 (D. Or. 2003); *Ashby* v. *Farmers Group, Inc.*, 261 F. Supp. 2d 1213 (D. Or. 2003); *Razilov* v. *Nationwide Mut. Ins. Co.*, 242 F. Supp. 2d 977 (D. Or. 2003).

Plaintiffs in the four cases at bar appealed the adverse summary judgment rulings to the Ninth Circuit. In an opinion issued on August 4, 2005, in the consolidated *Reynolds* and *Edo* cases, a divided panel reversed the district court on each of the FCRA issues described above.[3] In particular, the Ninth Circuit held that an adverse action occurs when an insurer charges an initial rate that is higher than the consumer would have been offered if he had a better credit score, and that any insurance entity with any relation to the scoring of the consumer or a rate decision for that consumer is obligated to send an adverse-action notice. Pet. App. 48a-54a, 57a-60a.[4]

The Ninth Circuit also rejected Petitioners' arguments that they were entitled to summary judgment in any event because any alleged noncompliance was not "willfu[l]" under § 1681n. Pet. App. 65a-66a. The court concluded that the

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[3] The Court resolved the appeals of Petitioners State Farm and Safeco in unpublished dispositions issued the same day and relied therein on the decision in the consolidated *Reynolds* and *Edo* cases. This brief uses the term "decision below" to refer to the Ninth Circuit's last decision under the consolidated *Reynolds* and *Edo* caption. *See infra* 5-6.

[4] In this brief, citations to the "Pet. App." are to the Appendix to the Petition for Safeco Insurance Company unless otherwise indicated.

"willfulness" standard encompasses not only "conscious disregard" of known legal obligations, but also "recklessness." *Id.* at 62a. In addition, the court reasoned, a defendant may act "recklessly" if it adopts "unreasonable answers to issues of first impression" under the FCRA. *Id.* at 64a. Two members of the panel then went further, concluding (apparently as a matter of law) that Petitioners' interpretations were so "objectively unmeritorious" that they were reckless and thus willful. *Id.* at 64a-65a. The panel majority did not explain how its conclusion could possibly be consistent with the fact that the district court—another Article III tribunal—had concluded that the FCRA "unambiguous[ly] and plainly" supported Petitioners' construction of the statute. *Mark*, 275 F. Supp. 2d at 1318. Judge Bybee dissented, explaining that he "would not decide, as a matter of fact or law, that the insurance companies acted willfully" without further examination of that question. Pet. App. 67a-68a.

Joined by several amici, including the AIA and NAMIC, Petitioners sought rehearing en banc, noting that the Ninth Circuit's holding that adherence to an "unreasonable" legal interpretation may constitute willful noncompliance directly contradicted decisions of this Court. *See, e.g.*, Br. for Amici Curiae AIA and NAMIC in Support of Pet. for Reh'g En Banc 5-6 (citing *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988) (rejecting the proposition that "a finding of unreasonableness [would] suffice as proof of" willfulness); *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 616 (1993)). In response, the Ninth Circuit issued an amended opinion that reached the same result but removed the words "reasonable" and "unreasonable," replacing them with synonyms such as "tenable," "indefensible," and "implausible." Pet. App. 69a-99a. Judge Bybee again dissented. *Id.* at 99a-101a.

Petitioners once more sought rehearing en banc, and the Ninth Circuit issued another amended opinion. This time, however, the court responded to the petitions by retreating from its *sua sponte* finding of Petitioners' alleged willful noncompliance, instead remanding to the district court to decide whether Petitioners had "willfully" violated the

FCRA. *Id.* at 129a. The court appeared to set forth a two-step framework for addressing that question under its "reckless disregard" standard: First, a court should determine whether a defendant adopted an interpretation of the FCRA that the court (in hindsight) finds "implausible." *Id.* If so, the court must then examine the "obviousness or unreasonableness of the erroneous interpretation" and, "[i]n some cases," "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." *Id.* The court noted that it found "some" of Petitioners' FCRA interpretations "implausible," without further specification, thus requiring the additional "recklessness" inquiry on remand. *Id.* The Ninth Circuit did not, however, specify how a district court is to apply or otherwise use the "unreasonableness" or "company decision" factors, what weight should be accorded each, or when examination of the second is appropriate.

SUMMARY OF ARGUMENT

Amici agree with Petitioners that the decision below implicates a clear and entrenched circuit split on the meaning of the term "willfully" in 15 U.S.C. § 1681n, and that the Ninth Circuit adopted an erroneous interpretation of that term. Amici urge this Court to resolve that split now, in the context of these cases, for two reasons.

First, the Ninth Circuit's incorrect construction of the term "willfully" will require costly, intrusive, and needless litigation under a standard likely to breed significant confusion in the district court. Had the Ninth Circuit interpreted § 1681n correctly, Petitioners should have been entitled to judgment as a matter of law on the ground that they did not "conscious[ly] disregard" any known legal obligations under the FCRA. The positions Petitioners had followed and defended in the district court and Ninth Circuit were not only eminently reasonable, they were in fact more faithful to statutory text and structure than those the Ninth Circuit adopted. The only court previously to address those positions—the district court—not only had *agreed* with Petitioners' interpretations of the FCRA, but in fact had concluded

that the statutory text "reasonably cannot be read" to support the construction that the *Ninth Circuit* later adopted. *Mark* v. *Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1317 (D. Or. 2003). The Ninth Circuit's novel construction of the FCRA's adverse-action notice requirement was neither known nor established prior to the decision in these cases. Petitioners' failure to comply with that unlikely construction thus could not constitute "conscious disregard" of known legal obligations under the FCRA.

Second, the Ninth Circuit's erroneous construction of § 1681n threatens substantial harm to the insurance industry. If allowed to stand, the decisions below will permit the imposition of staggering liability, with necessarily severe consequences for insurers and consumers alike. Moreover, because questions of first impression regarding the FCRA may frequently arise in other insurance contexts, insurers will face the threat of costly class-action litigation and substantial liability for any interpretation of the Act that a court later deems "implausible." The Ninth Circuit's erroneous interpretation will similarly bind the many other businesses that routinely make use of consumer credit information. This Court's review is critical to protecting personal-lines insurers and other businesses from substantial damages that Congress never intended to impose.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF SEVERAL OTHER COURTS OF APPEALS AND IS ERRONEOUS

Amici agree with Petitioners that there is a clear and well-developed split among the circuit courts on the important question of the meaning of the term "willfully" in 15 U.S.C. § 1681n. As Petitioners explain, the Ninth Circuit's decision conflicts with the holdings of at least seven other circuits, which have concluded that a defendant "willfully" violates the FCRA only if it "knowingly and intentionally committed an act in conscious disregard for the rights of the consumer." *Ausherman* v. *Bank of Am. Corp.*, 352 F.3d 896,

900 (4th Cir. 2003); *see Wantz* v. *Experian Inf. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004); *Phillips* v. *Grendahl*, 312 F.3d 357, 368 (8th Cir. 2002); *Cousin* v. *Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001); *Duncan* v. *Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998); *Casella* v. *Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995); *Zamora* v. *Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1369 (10th Cir. 1987) (per curiam); Hartford Fire Pet. 11-15; Safeco Pet. 14-19; GEICO Pet. 10-13; State Farm Pet. 21-23. Amici also agree with Petitioners that the Ninth Circuit's interpretation of "willfully" is erroneous, because it conflicts with the FCRA's text, structure, and history, and because the Ninth Circuit's reasoning is inconsistent with decisions of this Court. *See* Pet. for Hartford Fire, at 15-20; Pet. for Safeco, at 19-23; Pet. for GEICO, at 13-24; Pet. for State Farm, at 23-30.

Petitioners comprehensively and persuasively brief these issues, and amici will not repeat those arguments here. Instead, amici submit this brief to explain why the Court should resolve the circuit split at this time and in these cases. Review is necessary now for two principal reasons. First, the Ninth Circuit's decision will require Petitioners to engage in wholly unnecessary and costly litigation in these cases under an ill-defined, standardless, and intrusive framework governing the "recklessness" inquiry. Second, the decision below threatens grave injury to the insurance industry as a whole, permitting substantial statutory damage awards in FCRA adverse-action litigation and encouraging the filing of class-action suits seeking massive damages for blameless conduct in this and other FCRA contexts.

A. The Ninth Circuit's Erroneous Decision Requires Wholly Unnecessary And Costly Litigation Under A "Willfulness" Standard That Lacks Any Definite Content

The Ninth Circuit remanded these cases based on its finding that "some" of Petitioners' interpretations of the FCRA were "implausible." Pet. App. 129a. In the Ninth Circuit's view, its hindsight observation of supposed "implausibility" triggered the need for a remand so that the dis-

trict court could now undertake an additional and searching inquiry to determine whether certain of the defendant's failures to comply with the FCRA were "reckless," thereby giving rise to statutory and punitive damages. *Id.* The Ninth Circuit explained that this "recklessness" inquiry involves at least two factors—the "unreasonableness" of the defendant's interpretation of the FCRA, and a factual inquiry into the manner in which the defendant's decision makers reached the supposedly "implausible" interpretations, based on "the testimony of the company's executives *and counsel*." *Id.* (emphasis added).

The Ninth Circuit failed to clarify the content or purpose of any step in this analysis. It did not, for example, explain what constitutes an "implausible" interpretation beyond its bare assertion that "at least some" of Petitioners' positions satisfied that standard, without further specification. The Ninth Circuit provided no guidance about how courts are to identify those interpretations that are sufficiently "implausible" to warrant further "recklessness" scrutiny but not so "unreasonable" as to justify a finding of "recklessness." And the court failed to direct what weight either of the two factors should carry or what is unique about "some cases" that requires an examination of the internal communications between an insurer and its counsel. The Ninth Circuit's decision thus breeds confusion and, until it is reversed, will require district courts confronted with class actions seeking massive statutory damages under the FCRA to apply a "recklessness" framework that defies concrete application.

B. Under The Correct Standard, All Petitioners Should Have Been Entitled To Judgment As A Matter Of Law

The standardless litigation to which the Ninth Circuit has subjected the parties and the district court is not justified. Under the correct interpretation of the term "willfully" in § 1681n, adopted by at least seven courts of appeals, the only question the court should have addressed in these cases was whether the defendants exhibited "conscious disregard"

of known legal obligations. *See supra* pp. 7-8 (citing cases adopting this standard). The answer to that question here was plainly no. The positions Petitioners adopted regarding the FCRA's adverse-action notice requirement were not only eminently reasonable, they were in fact compliant with the FCRA. The district court concluded, in the first published opinions addressing these questions, that the FCRA "unambiguous[ly] and plainly" supported Petitioners' interpretations. *Mark*, 275 F. Supp. 2d at 1318. And in any event, where, as here, "[t]here was no prior guidance to suggest that" defendants' practices were "insufficient" under the FCRA, the court "[could] not conclude that [the defendants] knowingly and intentionally" violated the FCRA "in conscious disregard of consumers' rights." *Stevenson* v. *TRW Inc.*, 987 F.2d 288, 296 (5th Cir. 1993). A closer examination of the actual FCRA statutory violations that the Ninth Circuit believes Petitioners may have "recklessly" committed demonstrates the magnitude of the court's error in these cases.

1. An "Adverse Action" Does Not Occur Whenever An Insurer Charges A Customer More Than The Insurer's Best Rate, Or When An Insurer Establishes An Initial Insurance Charge

The FCRA defines an "adverse action" in the insurance context to mean:

> a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.

§ 1681a(k)(1)(B)(i). The Ninth Circuit held that the establishment of an initial charge is covered by the statutory phrase "'increase in any charge' . . . for insurance." Pet. App. 114a. In particular, the Ninth Circuit concluded that an insurer "increase[s]" a "charge" for insurance, based on a credit report, when the insurer "charg[es] a higher price for initial insurance than the insured would otherwise have been

charged because of information in a consumer credit report." *Id.* at 114a.

As Petitioners argued below, that reading runs contrary to the plain meaning of the statutory text. The Ninth Circuit recognized that "'[i]ncrease' means to make something greater." *Id.* Yet one cannot make "something" greater if that "something"—here a charge to the consumer—does not yet exist. This is not only the natural use of "increase," but also the way numerous courts, including the Ninth Circuit itself, have used the term.[5]

The Ninth Circuit rejected this customary meaning of "increase" based on a phrase found later in the "adverse action" definition: "any insurance, existing or applied for." The court assumed that Congress intended each of the various actions described in § 1681a(k)(1)(B)(i)—*e.g.*, "denial," "increase"—to modify both "existing" and "applied for" insurance. Pet. App. 115a. But that assumption is erroneous; the court's reading ignores that most of the actions described in § 1681a(k)(1)(B)(i) make sense only when read to modify either "existing" or "applied for" insurance, but not both. For example, "cancellation" naturally modifies only "existing" insurance, as in the cancellation of an existing insurance policy based on information learned from a customer's credit report. One cannot "cancel" something that does not exist. The term "denial," on the other hand, naturally modifies only insurance that a consumer has "applied for," as in the denial of an application for insurance based on information in the applicant's credit report. Thus, insurers could reasonably interpret § 1681a(k)(1)(B)(i) as requiring notices for

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[5] *See Certain Underwriters at Lloyd's* v. *Montford*, 52 F.3d 219, 221 (9th Cir. 1995) ("The insured value ... was initially set at $925,000, and was [later] increased to $1,050,000 ...."); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 558 (1962) (plurality op.); *Bernklau* v. *Principi*, 291 F.3d 795, 798 (Fed. Cir. 2002); *United States* v. *Mendez-Zamora*, 296 F.3d 1013, 1016 (10th Cir. 2002); *United States* v. *Schallom*, 998 F.2d 196, 199 (4th Cir. 1993) (per curiam); *United States* v. *Golden*, 954 F.2d 1413, 1415 (7th Cir. 1992).

- a "denial" of an "appli[cation]" for insurance,
- a "cancellation" of "existing" insurance,
- an "increase in any charge for . . . existing" insurance, or
- "a reduction or other adverse or unfavorable change in the terms of coverage or amount of . . . existing" insurance.

By stretching the term "increase" to modify both "existing" and "applied for" insurance, the Ninth Circuit effectively interpreted "increase" to mean establishing an insurance "charge" that does not yet exist and doing so at a higher level than the "charge" might have been established under different circumstances. That reading, to say the least, strains the normal, straightforward reading of the term. That much is clear from the Ninth Circuit's awkwardly phrased conclusion that the plaintiff's "rate was increased above that which it would have otherwise been because of his credit report." Pet.App. 117a.

But even if the FCRA's definition of "adverse action" did extend to "increase[s]" in "charge[s]" above a hypothetical and nonexistent charge, the Ninth Circuit's "best rate" construction—*i.e.*, that an "adverse action" occurs "whenever a consumer pays a higher rate because his credit rating is less than the top potential score," *id.* at 118a—is neither obvious nor correct. The court's interpretation does not seek to measure the effect that the use of a credit report has on an insurance charge. For example, in the Ninth Circuit's view, the application of the adverse-action notice requirement does not turn on whether the use of a credit report adversely affects a consumer versus the non-use of that credit report. Rather, the Ninth Circuit decision requires insurers to measure the adverseness of using credit-report information against a hypothetical scenario in which different credit-report information is used. Nothing in the statute suggests that construction, nor did the court attempt to ground its holding in any statutory text. Rather, the court appeared to impose the requirement as a matter of mere policy. *See id.*

The Ninth Circuit's interpretation flies in the face of common sense. In that court's view, the FCRA would require insurers to notify a consumer that she was adversely affected by the use of her credit report even if that use in fact yielded a *better* rate than had her credit report not been used at all.

Recent congressional action supports the view that both the "initial charge" and "best rate" constructions in the decisions below are erroneous. In 2003, Congress amended the FCRA to require creditors (but not insurers) to provide a separate "risk-based-pricing" notice to a consumer when the use of credit-report information results in an offer with "material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers." Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 311(a), 117 Stat. 1952, 1988 (codified at 15 U.S.C. § 1681m(h)(1)). This new provision expressly applies to initial offers and specifies a baseline (not "best rate") against which a creditor must measure the effect that use of credit-report information had. Congress thus knew how to link an FCRA notice requirement to the setting of an initial rate that is not as favorable as another baseline rate. That the FCRA's insurance-specific, adverse-action definition lacks similarly plain language confirms the error of the Ninth Circuit's decision. Indeed, the court's construction would hold insurers to a higher standard than lenders, even though the only clear FCRA textual requirement for the provision of notices in this context is the risk-based pricing provision for creditors added by the 2003 FCRA amendments.

2. An Insurance Affiliate That Neither Issues An Insurance Policy To A Person Nor Denies That Person Insurance Coverage Does Not "Take" An "Adverse Action" Against That Person

As Petitioners argued below, only the entity that issues the relevant insurance policy (and thus, for example,

"charge[s]" a customer for insurance or "cancel[s]" that insurance) or the entity that "deni[es]" insurance coverage "takes" one of the "adverse actions" specified in § 1681a(k)(1)(B)(i). Only that entity is therefore required under the FCRA to send the consumer an "adverse action" notice. The Ninth Circuit erred in exposing additional insurer affiliates to liability if they do not send their own additional notices to the consumer or list themselves in the original notice. The court cast this unjustifiably wide net of liability by holding that any entity with any theoretical connection to an insurance rating decision "takes" an "adverse action" within the meaning of § 1681m(a), and therefore may be held liable when a consumer is not provided an adverse-action notice.

The Ninth Circuit's conclusion was based primarily on an incorrect piecing together of multiple statutory sections. The court emphasized two phrases: "any person" in § 1681m(a), and "in connection with the underwriting of insurance" in § 1681a(k)(1)(B)(i). The Ninth Circuit apparently believed that these phrases, if read together, reveal congressional intent to require any person with any theoretical connection to the purported adverse action to issue an adverse-action notice. *See* Pet. App. 122a. The terms are found in different statutory provisions, however, and there is no indication that Congress intended the meaning the Ninth Circuit adopted.

The court also purported to ground its construction in the FCRA's purposes, but its holding runs counter to those purposes. As the Ninth Circuit noted, adverse-action notices are intended to provide consumers "important information about the benefits of improving their credit rating." Pet. App. 116a. That information is conveyed by any single entity providing an adverse-action notice, thereby informing the consumer that her credit information contributed to an adverse action. Requiring every insurance entity with any theoretical connection to the purported adverse action to issue such a notice, or requiring every such entity to be listed in a single notice, does nothing to enhance the con-

sumer's understanding. In fact, such a requirement is likely only to confuse. Under the decisions below, consumers must receive notices from numerous insurance entities (or notices listing numerous such entities) with whom the consumer has never had any interaction.

C. The Ninth Circuit's Refusal To Grant Judgment As A Matter Of Law On The Question Of Willfulness Illustrates The Serious Error In That Court's Approach

Petitioners' constructions of the FCRA adverse-action requirement were compliant with the Act and, at a minimum, were far from unreasonable. The Ninth Circuit's contrary construction of that requirement was for this reason far from preordained. For purposes of the proper "willfulness" inquiry, the rules imposed under the court's novel interpretation of the FCRA could hardly be termed known legal obligations. Accordingly, had the Ninth Circuit applied the proper legal standard when considering respondents' allegations of "willful" noncompliance, only one judgment could have been rendered. Petitioners did not knowingly and intentionally disregard any known legal obligation under the FCRA. The Ninth Circuit's remand for a costly inquiry into petitioners alleged "recklessness" should never have been ordered.

The decision below thus compellingly illustrates the serious error in the Ninth Circuit's interpretation of § 1681n. At base, the Ninth Circuit held Petitioners to have "willfully" violated the FCRA simply because the court disagreed with Petitioners' answers to questions of first impression regarding ambiguous and complex statutory provisions. The court labeled "some of" Petitioners' positions "implausible" even though the agency charged with enforcing the FCRA's requirements had issued no binding interpretation of the relevant provisions and had not for 30 years (and to amici's knowledge, still has not) brought any enforcement action against an insurance company for failing to issue adverse-action notices in these circumstances. And the court reached these conclusions even though another Article

III court had adopted precisely the positions Petitioners advanced—and had further concluded that the statutory text "reasonably cannot be read" to support the *Ninth Circuit's* construction. *Mark* v. *Valley Ins. Co.*, 275 F. Supp. 2d at 1317; *see Spano* v. *Safeco Ins. Co.*, 215 F.R.D. 601, 605-606 (D. Or. 2003); *Ashby* v. *Farmers Group, Inc.*, 261 F. Supp. 2d 1213, 1224-1226 (D. Or. 2003); *Razilov* v. *Nationwide Mut. Ins. Co.*, 242 F. Supp. 2d 977, 988-991 (D. Or. 2003).

Although the Ninth Circuit purported merely to construe the FCRA's statutory requirements, the court's reasoning resembles the type of rulemaking that is not properly the province of an Article III court, yet without the notice and opportunity for comment that normally accompanies such process. The court then imposed these requirements *ex post facto* by finding that Petitioners should have obeyed them long before they were ever announced. In doing so, the court relied more on its own policy judgments than on any "intent" reasonably attributable to Congress. A stark example is the Ninth Circuit's holding regarding who "takes" an adverse action. The court based its expansion of the adverse-action requirement to multiple insurance company affiliates based on mere conjecture that consumers probably do not "understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure." Pet. App. 124a. The court then asserted—without reference to statutory text, structure or legislative history—that Congress intended the FCRA to remedy this assumed lack of knowledge "[b]y imposing joint and several liability" on all insurance entities tangentially related to an insurance rating decision. *Id.*; *see id.* ("By having the organizations explain the actions each affiliated company took, Congress made it more likely that consumers would comprehend what transpired with respect to the increased cost of their policy."). From that speculative recreation of congressional intent, the Ninth Circuit then fashioned from whole cloth new obligations that

no court or agency had ever imposed.[6] And, most remarkably, the court concluded that its interpretations were the *only* "plausible" ones, accordingly holding that any insurer that failed to anticipate them had acted so recklessly that it could be subject to statutory and punitive damages, the sanction reserved for only the most severe and intentional violations of the FCRA.

The Ninth Circuit's authorization of such severe penalties in these circumstances fundamentally distorts the structure of the FCRA. The statute permits actual (compensatory) damages for "negligent" conduct, *i.e.*, when the defendant should have known, in the exercise of due care, that its practices violated the Act. § 1681o. The statute provides for statutory and punitive damages, by contrast, only when the defendant acts "willfully." By construing the term "willfully" to cover conduct that—for reasons amici explain above—does not even qualify as "negligent," the Ninth Circuit turned Congress's intent on its head. *See* Hartford Fire Pet. 16-17.

The interpretation of the term "willfully" adopted by the Ninth Circuit is dangerous for yet another reason. It will in the future require insurers to give the FCRA the broadest possible reading, in all contexts, lest a court later disagree and interpret the Act differently. As Petitioners demonstrate, that result frustrates the very purposes that the FCRA was designed to further. This effect is com-

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[6] Moreover, as Petitioner Hartford Fire argues, Hartford Fire Pet. 23-26, the Ninth Circuit engaged in the same type of unguided "interpretation" in creating rules—without urging by any party or amici, and without the benefit of briefing—respecting the information that must be contained in an adverse-action notice. *See* Pet. App. 121a. The Ninth Circuit relegated the requirements that *Congress* prescribed to a footnote, and supplemented the plain language of the statute with additional requirements that the *court* deemed important. Thus, based on little more than its own conceptions of good policy, the court held that an adverse-action notice must "at a minimum, . . . describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action, and their respective roles." *Id.*

pounded by the Ninth Circuit's creation of an entirely novel standard for adjudicating a party's "willfulness" based on terms like "untenable," "creative," "implausible," and "indefensible." Those words carry no established meaning in other legal contexts, and only the Ninth Circuit knows their intended meaning here. The result is an unknown and unknowable standard that provides regulated parties no useful guidance.

By addressing these cases, this Court can both correct the Ninth Circuit's pernicious construction and resolve the circuit split that the decisions below both highlight and exacerbate.

II. THE NINTH CIRCUIT'S DECISIONS ARE OF SUBSTANTIAL IMPORTANCE TO THE INSURANCE INDUSTRY AS A WHOLE

The issues the Ninth Circuit addressed have substantial importance not just to the parties, but to all of the insurance industry, many members of which interpreted the Act much as Petitioners did. The conclusions in the decision below expose insurers to statutory damages in situations that Congress did not intend, and to punitive damages even when they have sought in good faith to comply with the FCRA, including by seeking counsel's advice. This exposure threatens significant liability, with broad ramifications for the industry's ability to perform its important functions. Amici estimate that since the beginning of 2001, more than 150 million new personal lines insurance policies have been written. Conservatively estimating that adverse-action violations might be found for half of those policies under the Ninth Circuit's incorrect constructions of the Act, the potential liability is staggering—particularly since the FCRA, unlike the Truth In Lending Act, does not impose a cap on the total statutory damages available in class-action litigation. *Compare* 15 U.S.C. § 1681o(a)(1), *with id.* § 1640(a)(2)(B). The damages that the decision below authorizes would have a substantial and real impact on the operations of amici's members. By removing enormous amounts of capital from

the insurance system, such damages would inevitably harm the insurance marketplace.

In addition, the Ninth Circuit's decision has ramifications that extend well beyond the specific FCRA issues addressed below. The Act regulates insurers in several ways. Issues of first impression commonly arise under the FCRA, and as long as the Ninth Circuit's erroneous "willfulness" standard remains the law, insurers will face the prospect of severe class-action liability if a court later decides (in hindsight) that their answers to any unsettled FCRA questions are "implausible." The nature of the FCRA is such that any single interpretation of an FCRA requirement frequently affects millions of transactions yearly. If a court later decides that adherence to such an interpretation was reckless under the Ninth Circuit's new rule, statutory damages of $100 to $1000 might be available for each of those millions of transactions, resulting in potentially enormous liability.

This Court's review is therefore critical to protecting insurers from staggering damages that Congress never intended to impose.

CONCLUSION

For the foregoing reasons, this Court should grant the writs of certiorari and reverse the decisions of the Ninth Circuit.

Respectfully submitted.

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Nos. 06-82, 06-84, 06-100, and 06-101

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In The
Supreme Court of the United States

HARTFORD FINANCIAL SERVICES GROUP, INC., *et al.*,

Petitioners,

-vs-

JASON RAY REYNOLDS, *et al.*,

Respondents.

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

-vs-

CHARLES BURR, *et al.*,

Respondents.

[Additional Captions On Inside Cover]

On Petitions For Writs Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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AJENE EDO,

Respondent.

Case 06-101

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Petitioners,

v.

JULIE WILLES,

Respondent.

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size, in every industrial sector and from every region of the country.[1] A principal function of the Chamber is to advocate the interests of the business community by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses.

The Business Roundtable ("Roundtable") is an association of chief executive officers of leading American companies with over $4.5 trillion in annual revenues and more than ten million employees. The Roundtable's member companies comprise nearly one-third of the total value of the United States stock market, and represent nearly one-third of all corporate income taxes paid to the United States government. Collectively, the Roundtable's member companies returned more than $10 billion in dividends to shareholders and the American economy in 2005. The Roundtable is committed to advocating public policies which ensure vigorous economic growth and a productive workforce in America.

The Fair Credit Reporting Act ("FCRA") is a fundamental part of how business is conducted in this country. Nearly every type of commerce involves a party's credit history, for purposes as diverse as determining eligibility for mortgages, personal and business loans and other financial services; verification of educational records for licensing purposes; establishing an account for the purchase and service of telephones and other goods; and to confirm the identity, references and other background information of individuals seeking employment or promotion.

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[1] Pursuant to United States Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity other than the Chamber and the Roundtable made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amici* brief, and their consent letters are on file with the Clerk of Court.

For this reason, the questions presented in these cases – namely, the scope of "adverse action" under the statute as it pertains to the sale of insurance, and the threshold of liability for "willful" violations of the FCRA – while of great concern to the nation's insurers, also go far beyond the provision of insurance to individual consumers. If left to stand, the Ninth Circuit's decision would unfairly expose the nation's businesses to liability for "willful" violations of the FCRA even when making a good-faith effort to comply with the statute; needlessly introduce uncertainty into countless transactions; and burden businesses and individuals alike with myriad unclear, even meaningless, notices under the FCRA.

The members of the Chamber and the Roundtable depend upon the procedures of the FCRA to accomplish all of these important purposes, and more. For the members of the Chamber and the Roundtable, it is therefore vital that the FCRA provide clear and consistent guidance as to a business' obligations when that business consults credit reports. And it is likewise important not only for every employer, merchant and service provider in the country – but for every consumer, employee and job applicant as well – that the required communications under the FCRA be understandable and helpful.

Accordingly, the Chamber and the Roundtable support the Petitions for Writs of *Certiorari* in these cases.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The case presents this Court with the opportunity to resolve a well-developed split between the Circuits concerning important, pervasive and recurring questions of federal law. The Ninth Circuit's holdings as to "adverse action" and "willfulness" under the FCRA are erroneous and pose devastating consequences for the daily transaction of business in this country. If left to stand, the Ninth Circuit's decision will needlessly introduce unfairness, uncertainty and confusion to all sectors of the American economy.

The Ninth Circuit's decision departs from both the unambiguous text of the FCRA and the case law established under that statute. Without intervention from this Court, the

Ninth Circuit's decision would dramatically expand the occurrences of "adverse actions" under the statute – rendering the accompanying "adverse action" notices to consumers so frequent and confusing as to be meaningless – and collapse the FCRA's express distinction between "willful" and non-willful violations of its terms.

The Ninth Circuit's Error as to "Adverse Action" under the FCRA

In the context of the sale of insurance, the FCRA expressly defines an "adverse action" as a denial, cancellation, increase in the change for, or change in the terms of coverage. Yet the Ninth Circuit's construction of "adverse action" ignores that statutory definition. Instead, the Ninth Circuit's decision expands the scope of "adverse action" to encompass any occasion in which an insurer consults a consumer's credit report and offers the consumer anything other than the insurer's best possible rate for insurance. That result is not only violative of the language of the statute, it also leads to absurd results.

The Ninth Circuit's definition of "adverse action" is confusing and impractical. No insurer can offer the lowest possible rate for its products to more than a small fraction of its customers (at least not while remaining in business). This fact alone would result in millions of consumers receiving "adverse action" notices for no reason other than that they were not offered the rate received by insurers' best customers. Still more puzzling is that the review of a consumer's credit report often leads the insurer to offer the consumer a better rate than would have been offered if the credit information had not been consulted. And yet, if that rate were anything less than the best available rate, the Ninth Circuit decision would require the insurer to send an "adverse action" notice to the consumer – despite the fact that both the consumer and the insurer were better off because of the use of the information in the credit report.

The impact of the Ninth Circuit's decision is also likely to be felt far beyond the insurance industry. The FCRA uses the same or substantially the same language to define "adverse action" in its provisions relating to other activities, including

the administration of regulatory licenses, eligibility for government benefits, and the use of credit reports for purposes of employment. As a result, the Ninth Circuit's decision can be expected to influence the construction of these related provisions of the statute. This would require the Ninth Circuit's "adverse action" notices to be sent in countless other contexts – including occasions in which an employer's review of a job applicant's credit report led to the offer of a more lucrative position than that in which the applicant was interested, but not the very best job offered to others.

The Ninth Circuit also erred by ignoring the plain language of the FCRA and announcing new components to be included in every "adverse action" notice. The FCRA clearly provides that only two pieces of information must be included in such a notice: (i) the contact information for the credit reporting agency which provided the report, and (ii) the recipient's right to receive a free copy of that report. But the Ninth Circuit's decision added to this list by also requiring an explanation of the specific "effect" of the action upon the consumer, as well as a series of disclosures regarding "affiliated" entities uninvolved with the particular transaction – if not also an identification of the exact information at issue in the report. The Ninth Circuit's decision further departs from the statute by imposing joint and several liability for the failure to craft an appropriate notice.

The Ninth Circuit's decision flies in the face of the FCRA's express mandate; is so ill-defined as to be difficult, if not impossible, for businesses to follow; invites litigation over the form of notice; and will cause confusion instead of reducing it.

The Ninth Circuit's Error as to "Willful" Violations of the FCRA

The FCRA contains a clear distinction between different levels of liability for "willful" and non-willful violations of its terms. A "willful" violation carries with it the potential liability for unlimited punitive damages, while non-willful violations are addressed by less severe remedies. Differentiating between the two levels of liability reflects a purposeful choice by Congress to treat more severely those who act to violate the

FCRA despite knowing (or intentionally blinding themselves to the fact) that their actions are unlawful.

The Ninth Circuit's decision construing these provisions of the FCRA effectively erases the distinction between "willful" and non-willful violations of the statute. The Ninth Circuit's decision redefines "willful" to encompass even actions which are negligent and unintended. Still worse, the Ninth Circuit's decision significantly erodes (if not eliminates) consultation with counsel as a defense against allegations of "willful" violations of the FCRA, and even invites discovery into the well-established privilege that protects confidential deliberations between attorney and client.

The Ninth Circuit's decision is also contrary to the well-reasoned case law of other federal Courts of Appeal which have considered this issue. A "willful" violation of the FCRA should be limited to incidents in which a party acts in derogation of the statute knowing that such actions are unlawful, or deliberately avoiding such knowledge. Consultation with counsel regarding unsettled areas of law under the FCRA ought to be a meaningful, if not dispositive, defense against a "willful" violation of the statute.

Other federal statutes which utilize the same or similar language and remedial structure as the FCRA – such as the Age Discrimination in Employment Act, the Fair Labor Standards Act, and the Family and Medical Leave Act – have been so construed by this Court, as well as by other federal courts (including the Ninth Circuit). But the Ninth Circuit's decision threatens those holdings and exposes the nation's businesses to inconsistent treatment of the same behavior. Indeed, the Ninth Circuit's decision would punish behavior which for other purposes is considered good-faith and even exculpatory.

If left undisturbed, the Ninth Circuit's decision will undermine the guidance provided by the FCRA to the nation's business community, and replace it with uncertainty as to how to prevent the devastating liability which can accompany "willful" violations of the statute.

REASONS FOR GRANTING THE WRITS

The Petitions for Writs of *Certiorari* should be granted. The Ninth Circuit's decision presents a well-developed split in authority between the Circuits, and is erroneous in two important ways: (1) its holding as to what constitutes an "adverse action" and corresponding notice under the statute; and (2) its holding as to what is a "willful" violation of the FCRA.

If permitted to stand, the Ninth Circuit's decision will introduce unfairness, uncertainty and confusion to the countless transactions which occur every day, in every part of the country, and in every sector of the economy.

I. THE NINTH CIRCUIT'S CREATION OF NEW "ADVERSE ACTION" STANDARDS IS ERRONEOUS AND HARMFUL TO BUSINESSES AND CONSUMERS

The Ninth Circuit's decision is a radical departure from the statutory bases for an "adverse action" under the FCRA. While Petitioners have articulated numerous reasons why the Ninth Circuit's decision is not based in law and how it will needlessly disrupt the provision of insurance, the full impact of the decision is hardly limited to the insurance industry. If left to stand, the Ninth Circuit's decision will influence the FCRA practices of all other industries which consult credit reports, leading to unfairly burdensome requirements and confusing communications to consumers in all sectors of the economy.

A. The Ninth's Circuit's "Adverse Action" Holding Would Harm Insurers and Their Consumers

The Ninth Circuit's decision is likely to mislead consumers rather than inform them. Under the Ninth Circuit's holding, an "adverse action" occurs each time an insurer declines to offer a consumer the "best possible rate," based in any way upon the contents of that consumer's credit report. *Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, 1093 n.11 (9th Cir. 2006). However, it is infeasible for insurers to offer their "best possible rate" to more than a small percentage of their customers – at least, not while still hoping to stay in business. Accordingly, under the Ninth Circuit

decision, all other consumers seeking insurance – that is, the vast majority of consumers – would automatically receive an adverse action notice upon applying for insurance. *Id.*

This would be particularly misleading in instances when an insurer used a consumer's favorable credit report to offer the consumer a rate ***better*** than that which would have been offered but for the information obtained from the credit report. In such a case, the ***consumer benefits*** from a review of her credit report. Likewise, the ***insurer benefits*** from a better understanding of a potential customer and its own exposure to risk. And yet, under the Ninth Circuit decision, the insurer would be obligated to send the consumer an "adverse action" notice if the more attractive rate offered to the consumer was anything less than the insurer's "best possible rate."

That outcome disserves both the business and the consumer. Although the insurer obtained information which contributed to a more positive experience for the consumer, the insurer nevertheless would imperil the consumer's good will by sending the consumer a notice that the insurer had "acted adversely" toward her. In the same way, although the consumer is financially better-off because the insurer consulted her credit report, her receipt of an "adverse action" notice would lead her to believe the opposite were true. This is simply not what an "adverse action" should entail.[2]

This result is as much at odds with common sense as it is with the FCRA. The Ninth Circuit decision should not be allowed to stand.

B. The Ninth Circuit's "Adverse Action" Holding Would Harm Businesses, Consumers, Employees and Job-Seekers in All Industries

The Ninth Circuit's decision also imperils businesses and individuals in contexts other than the purchase of insurance.

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[2] For example, Black's Law Dictionary defines "adverse" as "opposed; contrary; in resistance or opposition to a[n] . . . application." Black's Law Dictionary 53 (6th Ed. 1990). Offering a consumer a better rate is hardly an action taken "in opposition to an application" or otherwise "adverse" to the consumer's interests. *Id.*

Most vulnerable to burdensome requirements and consumer confusion as a result of the Ninth Circuit's decision are parties involved in licensed occupations and the administration of government benefits, as well as employers across all fields of endeavor.

1. The Harm from Applying the Ninth Circuit's Holding to Government Instrumentalities

The statutory text erroneously construed by the Ninth Circuit in this case also appears in the provisions of the FCRA addressed to eligibility for governmental licenses and other state benefits. *See* 15 U.S.C. § 1681a(k)(1)(B). As such, the statute itself would appear to invite application of the Ninth Circuit's holding to those contexts, as well – thereby only compounding the confusion strewn by this incorrect decision.

Specifically, the FCRA defines "adverse action" in the insurance context as:

> ***[A] denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of*** coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.

15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

The FCRA uses the very same language to define "adverse action" as it relates to a "consumer's eligibility for a license or benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status:"

> ***[A] denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of,*** any license or benefit described in section 604(a)(3)(D).

See 15 U.S.C. § 1681a(k)(1)(B)(iii) (emphasis added).[3]

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[3] Section 604(a)(3)(D) of the FCRA provides that a person may obtain a consumer report for the purpose of determining a "consumer's eligibility for a license or other benefit granted by a governmental

(Continued on following page)

This identical statutory language, coupled with the paucity of case law construing Section 1681a(k)(1)(B)(iii) of the FCRA, raises the very real possibility that the Ninth Circuit's erroneous interpretation of what constitutes an "adverse action" will be imported to apply to governmental entities conferring licenses or benefits. Accordingly, those regulatory agencies – as well as the businesses and individuals who apply for those licenses and benefits – will find themselves in the same positions as insurers and applicants for insurance policies. Under the Ninth Circuit's "adverse action" mechanism, these activities, too, would be characterized by a deluge of unnecessary and confusing "adverse action" notices.

2. The Harm from Applying the Ninth Circuit's Holding to Employment-Related Background Checks

The statutory text erroneously construed by the Ninth Circuit is also shared by the sections of the FCRA regarding background checks in the context of applications for employment or promotion. Again, this renders the Ninth Circuit's errors unlikely to be contained solely within the market for insurance. To the contrary, the language of the statute facilitates the application of that erroneous decision to the nation's job-seekers in all fields of employment.

In particular, the FCRA defines "adverse action" in the insurance context as ***any "adverse or unfavorable change in the terms of"*** insurance coverage." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

Similarly, the FCRA defines "adverse action" in the employment context as any decision which ***"adversely affects any current or prospective employees."*** 15 U.S.C. § 1681a(k)(1)(B)(ii). That is, the FCRA treats an "adverse action" substantially similarly for both insurance and employment purposes: namely, it can be anything that adversely affects an individual's interests.

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instrumentality required by law to consider an applicant's financial responsibility or status." 15 U.S.C. § 1681b(a)(3)(D).

Consider the impact of applying the Ninth Circuit's holding to employers which conduct background checks for prospective and current employees. Nearly all employers in the United States fall into this category. According to the Society of Human Resource Management's "Reference and Background Checking Survey Report" (January 2005), approximately ***96% of all employers*** conduct background checks of some kind, including credit history reports, as to job applicants or employees.

Under the Ninth Circuit's holding, would all of these employers need to dispatch "adverse action" notices in every instance in which an applicant is not offered the "best possible position"? For example, if an individual indicates on his job application that he is interested in several different positions, and ultimately is hired for one of them (or even another position altogether), is there an "adverse action" if that position is somehow less desirable than the others in which he was interested? Or if that position is deemed relatively less attractive than the "best possible position"?

These results are equally as absurd as requiring an insurer to send an "adverse action" notice as a result of using an applicant's credit report to offer him a better rate on insurance. And yet that is exactly the confusion that the Ninth Circuit's decision would cause among the vast number of American employers who utilize background checks as a factor in their decisions to hire or promote.

3. The Harm from Applying the Ninth Circuit's Holding to Employment-Related "Pre-Adverse Action" Notices

Employers and job applicants would also feel the burden of the Ninth Circuit's decision in other ways. Specifically, the FCRA imposes upon employers who are contemplating taking an adverse action for an employment purpose the additional requirement of sending a "pre-adverse" action letter prior to actually taking the "adverse action." 5 U.S.C. § 1681b(b)(3). Under the Ninth Circuit's expansion of the amount of "adverse actions," so too would the number of "pre-adverse action" notifications dramatically increase.

In addition to the overwhelming burden upon businesses of trying to comply with such a regime, this poses two very real alternatives in the nation's workplaces. Either:

- Job applicants and employees alike would be inundated with "pre-adverse action" and "adverse action" notices such that their intended effect – allowing consumers to correct incorrect information before it could be acted upon – would be lost; or
- Employers would be inundated with inquiries regarding these "adverse actions" taken as to every job applicant, newly hired employee, promoted employee and employees who applied for promotion, to the detriment of activities that actually maintain and grow their businesses so that hiring can occur.

Both of these results are contrary to the FCRA, because they would render meaningless the statute's "adverse action" notice requirements. *See, e.g., Beck v. Prupis,* 529 U.S. 494, 506-07, 120 S. Ct. 1608, 1617 (2000) (restating "longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous"); Hearing, Senate Committee on Banking, Housing & Urban Affairs, 108th Congress 95-96 (2003) (Testimony of J. Howard Beales III, Director of Federal Trade Commission) (consumers will ignore notices if received too frequently).

Nor would it be appropriate if this erroneous reading of the FCRA operated as a disincentive to employers to conduct background checks. Such inquiries are an important safeguard against ills which vary from theft and violence in the workplace, to identity theft, to liability for negligent retention or hiring. Moreover, the provision of such background screening services is itself a significant part of the American economy. *See, e.g.,* KPMG Corporate Finance LLC, "The Market is Undergoing Dramatic Change. What Are the Opportunities For Your Business?" Background Screening, Fall 2003 (employment-related background checks approximately a $2 billion annual business). There would be no avoiding the detrimental impact of the Ninth Circuit's decision upon all manner of employers, employees and job applicants.

C. The Ninth Circuit's Creation of New Requirements for "Adverse Action" Notices Is Erroneous and Harmful to Businesses, Consumers, Employees and Job-Seekers

The Ninth Circuit also erred by departing from the plain language of the FCRA and introducing new requirements for the contents of an "adverse action" notice. The text of the FCRA is unambiguous and detailed regarding what an "adverse action" notice must contain. *See* 15 U.S.C. § 1681m(a). The Ninth Circuit disregarded these clear standards, replaced them with ill-defined and confusing new requirements, and left open the possibility that still more could be added by judicial re-drafting of the statute.

The FCRA plainly states that upon taking an "adverse action" based upon a credit report, a business must provide the consumer with a notice that conveys two basic pieces of information about the "adverse action":

(1) The contact information of the consumer reporting agency which furnished the report, along with a disclaimer that such agency did not make the "adverse action" decision and is therefore unable to provide the reasons why the action was taken; and

(2) The consumer's right to receive a free copy of the report within sixty days, and to dispute inaccurate or incomplete information contained in the report.

15 U.S.C. § 1681m(a).

The Ninth Circuit's decision disregards these clear requirements and instead adds a third, which is found nowhere in the text of the statute: that the notice must also ***"specify the effect of the action upon the consumer."*** *Reynolds*, 435 F.3d at 1095 (emphasis added).

Still further beyond the statute, the Ninth Circuit also held that if an "adverse action" notice is issued by an entity belonging to a group of "affiliated" entities, the notice must also "describ[e] the adverse effect of [the] credit report within that family of companies," "identif[y] those companies and their respective roles," and "explain the actions each affiliated

company took." *Id.*, 435 F.3d at 1096. Under the Ninth Circuit's holding, failure to provide a conforming notice would result in ***"joint and several liability"*** among all such "affiliated" companies, even those which had no involvement whatsoever with the consumer or transaction at issue. *Id.* (emphasis added).

But the Ninth Circuit's novel construction of the statute does not even stop there. In a footnote, the Ninth Circuit invites the question of whether a notice should *also* contain "a fuller description of what specific information was adverse" to the consumer. *Id.*, 435 F.3d at 1095 n.14 (emphasis added).

The Ninth's Circuit decision is contrary to the most basic and long-established element of statutory construction: that an unambiguous statute means what it says. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 187, 124 S. Ct. 1587, 1596 (2004) ("Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction") (quoting *United States v. Fisher*, 6 U.S. 358 (1805)). For this reason alone, the Ninth Circuit's decision is erroneous and should be reversed.

But just as with the other aspects of the Ninth Circuit's holding, this is about more than an appellate court making a wrong decision. By fundamentally changing – and expanding – the required contents of an "adverse action" notice, the Ninth Circuit holding is poised to spread confusion throughout a far wider cross-section of the American economy than just the insurance industry.

To revisit an example discussed above, the Ninth Circuit decision would leave businesses guessing as to how to state the adverse "effect" upon an employee of being placed in a better job than she would have been eligible for if the business had not checked her credit report. Similarly confusing would be how to convey the adverse "effect" where a job applicant was offered the highest-paying job for which he applied, but not the highest-paying or otherwise "best" position which was available at the business. Add to this the need to identify and explain the workings of "affiliated" entities wholly removed

from the event at hand, and composing (much less deciphering) a compliant notice would be nonsensical, if not impossible.

And yet the failure to do so might be considered a "willful" violation of the statute, with attendant, potentially unlimited liability for entire groups of "affiliated" companies. No one – businesses, licensing agencies, employers, employees, or job applicants – would benefit from the Ninth Circuit's decision. All would be worse off for it.

II. THE NINTH CIRCUIT'S "WILLFULNESS" HOLDING IS ERRONEOUS AND HARMFUL TO BUSINESSES AND EMPLOYERS

The Ninth Circuit erred in its construction of the FCRA provision allowing for enhanced remedies in the event of a "willful" violation of the statute. 15 U.S.C. § 1681n(a). As addressed at length in the Petitions, the Ninth Circuit's holding is contrary to the bedrock principles of statutory interpretation and invariably leads to absurd and unfair results. For these reasons alone, the holding should be reviewed and reversed.

But of particular concern to the memberships of the Chamber and the Roundtable are two potentially devastating effects of the Ninth Circuit's holding: (1) the uncertainty caused by the Ninth Circuit's departure from the established case law of other federal courts of appeal; and (2) the risk of liability for actions which have consistently been treated as good-faith and exculpatory under other federal statutes which utilize the same language and remedial structure as the FCRA.

A. The Harm Caused by the Ninth Circuit's Erroneous Interpretation of a "Willful" Violation of the FCRA

The Ninth Circuit's novel and unfairly expansive definition of a "willful" violation of the FCRA presents businesses across all industries with uncertainty and the prospect of catastrophic liability, even for good-faith attempts to comply with the statute. That result ought not stand.

1. The Importance of Clearly Defined Rules of Liability

The FCRA plainly distinguishes between non-willful and "willful" violations of its terms. To this end, the FCRA specifically provides that in the event of "***negligent noncompliance***" with the statute, a business's liability is limited to a plaintiff's actual damages. 15 U.S.C. § 1681o (emphasis added). On the other hand, the FCRA expressly provides that in the event of "***willful noncompliance***" with the statute, a business's liability includes not only actual damages, but also a possible award of unlimited punitive damages. 15 U.S.C. § 1681n(a) (emphasis added).

This distinction is meaningful, yet the Ninth Circuit's holding threatens to collapse it by rendering even unintentional and well-meaning violations of the statute eligible for the imposition of exemplary damages. Such an outcome would be potentially devastating to all the businesses across the nation whose operations depend upon a clear understanding of the FCRA. Those businesspeople need to know – indeed, they deserve to know – whether they stand to be punished for good-faith reliance upon the advice of counsel regarding unsettled issues under the FCRA. By massively expanding liability under the FCRA, the Ninth Circuit not only ignores the plain meaning of the FCRA, but the well-reasoned holdings of other federal courts of appeal.

2. The Ninth Circuit's Holding Is Contrary to the Established Case Law of Other Federal Courts of Appeal

The Ninth Circuit's interpretation of a "willful" violation of FCRA is a significant departure from the prior case law construing that provision of the statute. Those decisions held that a violation is not "willful" if, before engaging in the conduct at issue, the defendant takes steps to ascertain whether its actions will be violative of the law.

For example, the Sixth Circuit has held that a defendant cannot "willfully" violate the FCRA if the defendant "obtained [the consumer's] reports 'under what is believed to be a proper purpose under the statute but which a court

. . . later rule[s] to be impermissible'" under the statute. *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998) (quoting *Kennedy v. Border City Sav. & Loan Ass'n*, 747 F.2d 367, 370 (6th Cir. 1984) (concurring opinion)).

Other federal Courts of Appeal have likewise limited "willful" violations of the statute to instances in which a party acts with the understanding that its actions are not permitted. In the words of the Eighth Circuit, a "willful" violation of the FCRA is nothing less than the "knowing and intentional commission of an act the defendant knows to violate the law." *Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002). The Seventh Circuit has expressed this threshold in even more detail: "[t]o act willfully, a defendant must knowingly and intentionally violate the [FCRA], and it 'must also be conscious that [its] act impinges on the rights of others.'" *Wantz v. Experian Information Solutions*, 386 F.3d 829, 834 (7th Cir. 2004) (citations omitted).

These cases are also entirely consistent with this Court's own articulation of the core concept that:

> ***punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.***

State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 419, 123 S. Ct. 1513, 1521 (2003) (citations omitted) (emphasis added). For these reasons, this Court has repeatedly

> admonished that punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.

Id., 538 U.S. at 417, 123 S. Ct. at 1520 (internal quotation and citations omitted).

These cases, and this Court, have it right where the Ninth Circuit's decision has it wrong. In all of the FCRA cases

decided in other circuits, the defendant was protected from the most severe sanctions under the FCRA where the defendant lacked the knowledge that the actions at issue violated the statute. Of particular note – and particular importance to the business and legal communities – ***none*** of these cases suggest that a business can be subjected to such penalties for taking the advice of a lawyer regarding a matter of first impression under a statute, if a subsequent judicial decision reaches a different conclusion than that of the lawyer.

The Ninth Circuit's decision improperly inverts this state of affairs. By holding that reliance upon the advice of counsel "is not dispositive" of the issue of willfulness, the Ninth Circuit has eliminated the clear guidance that is vital to the FCRA and the businesses which operate under it. *Reynolds*, 435 F.3d at 1099. And the Ninth Circuit's decision stands to cause even more disruption, in that under the decision, "[w]hether or not there is a willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation. In some cases, it may also depend in part on . . . the testimony of the companies' executives and counsel." *Id.*

In other words, the Ninth Circuit's decision stands for the proposition that the mere allegation of "willfulness" may allow for discovery into the underlying legal advice and opinion, along with attendant erosions of the confidential relationship between attorneys and their clients. With one stroke, the Ninth Circuit decision eliminated any meaningful guidance and protection for businesses that must practice under the FCRA, increased the likelihood of litigation under the statute, and compromised the attorney-client relationship. That decision should not be permitted to stand.

B. The Uncertainty Caused by the Effect of the Ninth Circuit's Decision upon Other Statutes

The Ninth Circuit's decision is also likely to lead to uncertainty and inconsistent results under other federal statutes which utilize the same language and structure regarding "willful" violations of their terms. Like the FCRA, these statutes play key roles in regulating the nation's workplaces and jobs. If allowed to stand, the Ninth Circuit's decision would cause the same behavior –

conferring with counsel – to lead to dramatically different results under these substantially similar statutes.

1. The Age Discrimination in Employment Act

For example, the Age Discrimination in Employment Act ("ADEA") provides that "liquidated damages shall be payable only in cases of ***willful*** violations" of the statute. 29 U.S.C. § 626(b) (emphasis added). Like the FCRA, the ADEA does not expressly define "willful." *Id.*

In determining what is a "willful" violation of the ADEA, this Court held that "willfulness" was limited to instances in which the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126, 105 S. Ct. 613, 624 (1985). Accordingly, in the *Trans World* case, this Court reversed an award of liquidated damages because the employer conferred with counsel in attempting to determine whether its proposed actions would violate the ADEA. *Id.*, 469 U.S. at 130, 105 S. Ct. at 626.

This Court reaffirmed its definition of "willful" in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617, 113 S. Ct. 1701, 1710 (1993), and further explained that the statute's extra-compensatory damages provision did ***not*** apply where "an employer incorrectly but in good faith and non-recklessly believes that the statute permits a particular age-based decision." *Id.*

The Ninth Circuit's definition of "willful" under the FCRA is a distinct departure from this well-established level of culpability. Permitting that construction to stand would not only cause a split of authority under the FCRA, but also open a split between that statute and the ADEA. Businesses that make a good-faith effort to know and comply with these laws ought not be subjected to extreme penalties under one statute for the same behavior that is commended as exculpatory under the other.

2. The Fair Labor Standards Act

The Fair Labor Standards Act ("FLSA") is another statute of the utmost importance to businesses and employees across the nation. *See* 29 U.S.C. Sec. 216(e). Like the ADEA, the FLSA also includes enhanced penalties for "willful"

violations of its terms, without providing a definition of what is a "willful" violation. *See* 29 U.S.C. §§ 216(e), 255(a) (extending limitation period for claims arising out of "willful violation" of statute), 626(b) ("liquidated damages shall be payable only in cases of *willful* violations" of statute).

Courts – ***including the Ninth Circuit*** – have consistently held that a "willful" violation of this statute requires cognition or deliberate indifference to the terms of the statute. As the Ninth Circuit itself held, a "willful" violation occurs only when the "employer disregards the very 'possibility' that it was violating the statute." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908-09 (9th Cir. 2003).

The Ninth Circuit's decision in this case posits a markedly different view of "willfulness." Consultation with counsel should refute the contention that a possible violation of the statute was disregarded; but the Ninth Circuit's decision would enable "willful" violations to be found even after seeking legal advice. Again, given the substantial similarity of language and remedial schemes in the FCRA and the FLSA, a business should be treated similarly under both statutes. The Ninth Circuit's decision in this case undoes that result and leaves inconsistency and uncertainty in its place.

3. The Family and Medical Leave Act

Still another statute of general application, the Family and Medical Leave Act ("FMLA"), also provides for enhanced remedies in the event of a "willful" violation of its terms. *See* 29 U.S.C. § 2617(c)(2) (limitation period extended for claims arising out of "willful" violations of statute). And as with the other statutes discussed above, courts have held that a "willful" violation means "deliberately [choosing] to avoid researching the law's terms or affirmatively [evading] them." *Hoffman v. Professional Med. Team*, 394 F.3d 414, 419 (6th Cir. 2004).

A businessperson who consults with her counsel can hardly be said to have "deliberately chosen to avoid researching the law's terms or affirmatively evade them." Yet under the Ninth Circuit's holding in this case, the very same conduct could constitute a "willful" violation of the FCRA. There is no sense to be made of this dichotomy, and no guiding principles to be taken from it.

C. The Importance of Statutory Protection for this Nation's Businesses and Employers

There is no question that the FCRA and these other statutes provide important protections for consumers and employees. But these statutes ***also*** provide crucial protection for businesses and employers, by informing them how to conduct their business without transgressing the law. *See, e.g., Duffy v. Landberg,* 215 F.3d 871, 874-75 (8th Cir. 2000) (Fair Debt Collection Practices Act protects consumers, and compliance also protects businesses against liability); *see also Jang v. A.M. Miller & Assoc.*, 122 F.3d 480, 483-84 (7th Cir. 1997).

The Ninth Circuit's holding extinguishes this protection under the FCRA. The Ninth Circuit's holding divests the statute of any meaningful guidance for individuals and entities striving to ensure their compliance with the statute, while introducing needless risk, uncertainty and inconsistency into what had been a settled area of law upon which American businesses rightfully relied. The Ninth Circuit's holding should be reversed.

CONCLUSION

For all of these reasons, and those stated by the Petitioners, the Petitions for Writs of *Certiorari* should be granted.

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Supreme Court of the United States

HARTFORD FIRE INSURANCE COMPANY,

Petitioner

v.

JASON JAY REYNOLDS

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,

Petitioners

v.

CHARLES BURR, ET AL.

GEICO GENERAL INSURANCE COMPANY, ET AL.,

Petitioners

v.

AJENE EDO

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL.,

Petitioners

v.

JULIE WILLES

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE FINANCIAL SERVICES ROUNDTABLE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF FOR THE FINANCIAL SERVICES ROUNDTABLE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Financial Services Roundtable respectfully submits this brief as *amicus curiae* in support of the petitions for writs of *certiorari* in these four cases.[1]

INTEREST OF *AMICUS CURIAE*

The Financial Services Roundtable (Roundtable) represents 100 of the largest integrated financial services companies that provide banking, insurance, and investment products and services to American consumers.

The Roundtable believes that the Ninth Circuit has gone far astray in its interpretations of the Fair Credit Reporting Act (FCRA). The Roundtable urges this Court to grant *certiorari* to address the scope of the statutory terms "adverse action" and "willfully." The Ninth Circuit's unprecedented construction of the term "adverse action" will significantly increase the number of notices that businesses must send to consumers under the FCRA, raising compliance costs for a host of industries without providing any material benefit to consumers. The Ninth Circuit's concurrent expansion of the term "willfully" to include mere recklessness has permitted class action lawsuits seeking statutory and punitive damages that could, in the aggregate, cost the insurance and other financial services industries billions of dollars, despite the absence of any showing of actual injury on the part of the plaintiffs.

The Roundtable therefore respectfully urges the Court to grant the petitions for writs of *certiorari* and to review

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[1] Letters from petitioners and respondents indicating their consent to the filing of *amicus curiae* briefs have been filed with the Clerk of this Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

and reverse the Ninth Circuit's errant judgments in these four cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issues presented in these four petitions for writs of *certiorari* warrant review. This Court would benefit from granting *certiorari* in all four petitions because each petitioner could add valuable depth and focus to the statutory arguments in light of the factual circumstances present in each case. To the extent, however, that the Court is inclined to grant *certiorari* only in a single case and hold the other related petitions pending its disposition, the petition in *State Farm Mutual Automobile Insurance Co. v. Willes*, No. 06-101, appears to be the best vehicle for the Court to review in order to correct the Ninth Circuit's erroneous interpretation of both the "adverse action" and "willfully" provisions of the FCRA.

I. A. Only a small number of consumers receive the lowest possible rate for insurance when those rates are based in part on information in a consumer report. The Ninth Circuit's unprecedented interpretation of the term "adverse action" in the FCRA to require notice to a consumer when an insurer issues him anything but the lowest possible rate will force insurance companies to issue tens of millions of pointless notices to consumers. That deluge of additional notices will provide consumers with little, if any, appreciable benefit, and may, in fact, harm consumers by overloading them with information and numbing them to the important notices they otherwise receive.

The Ninth Circuit's interpretation of "adverse action" in this case is contrary to the plain language of the FCRA. The FCRA adverse action requirements do not address a hypothetical comparison of the rate charged to a consumer with the rate available to all consumers with "more favorable" consumer report information. The statutory framework confirms this point.

There also is a risk that the Ninth Circuit's holding may be extended beyond insurance to credit transactions and other transactions governed by the FCRA, which would

increase the number of adverse actions notices astronomically, burying consumers in paper. The extension of the Ninth Circuit's erroneous interpretation to credit transactions could have a dramatic adverse effect on banks and other lenders.

B. The Ninth Circuit's holding that all parties who participate in a transaction that results in an adverse action are each liable for a failure to provide an adverse action notice finds no statutory basis in the FCRA. The Ninth Circuit's ruling threatens to expand the reach of FCRA liability to banks and other lenders for insurance transactions, far beyond the intent of Congress. The potential effect of such an interpretation would be significant.

II. The Ninth Circuit's substantial relaxation of the "willfully" requirement for the award of statutory and punitive damages under the FCRA imposes significant liability not intended by Congress. The Ninth Circuit held that, in order to establish the willfulness necessary to obtain these special damages, a plaintiff need not demonstrate that a defendant knew its action violated the FCRA, even though such knowledge is an essential part of the typical definition of willfulness employed when punishment is involved.

A. By adopting a more lenient standard than most (if not all) other circuits, the Ninth Circuit has become a magnet for nationwide class action lawsuits alleging a variety of technical violations of the FCRA. This is so because an allegation of "willfully" permits a plaintiff (or, more realistically, an attorney who identifies technical violations of the FCRA and then locates a plaintiff in whose name to sue) to demand statutory damages for certain FCRA violations of at least $100 and up to $1,000 on behalf of each member of a class, a remedy not available if such violations are negligent.

The driving force in this kind of case is not compensation for individual harm, but attorneys intent on extracting money for themselves and a class of uninjured consumers from companies that provide valuable services that may have engaged in unknowing technical violations of a complex regulatory statute. The size of these suits,

and the risk of hundreds of millions (if not billions) of dollars in statutory or punitive damages, sometimes can enable plaintiff attorneys to successfully obtain tens (if not hundreds) of millions of dollars in settlements from entities that can show they acted in good faith, but cannot be certain that they could defeat the Ninth Circuit's unorthodox standard of "willfully."

B. By reading the term "willfully" to encompass states of mind other than a knowing violation of the law, the Ninth Circuit ignored basic rules of statutory construction that weigh against such a low threshold for recovery of punitive damages. The rule of lenity applies to the "willfully" provision of the FCRA because it authorizes punitive damages, which impose penal sanctions. The application of the rule of lenity to determine the meaning of "willfully" in the FCRA is particularly apposite because the FCRA's felony provisions also require the government to prove that a person acted "willfully" in order to establish criminal liability.

The structure of the FCRA also weighs strongly in favor of requiring a plaintiff to establish specific intent in order to recover punitive or statutory damages. In enacting the FCRA, Congress did not permit monetary remedies for every action that is later determined by a court to violate the FCRA. By limiting recovery of even actual damages to instances where a plaintiff can show a negligent violation of the FCRA, Congress necessarily understood that those subject to the FCRA could reasonably, *i.e.*, non-negligently, engage in conduct that violates the FCRA and that no damages should be awarded in such instances, regardless of the injuries incurred by the plaintiff. The legislative history confirms that Congress rejected proposals permitting the award of statutory or punitive damages for gross negligence, a term often used interchangeably with recklessness.

Finally the requirement that a federal statute be read to avoid doubt about its constitutionality also supports an interpretation of the term "willfully" to require a showing by a plaintiff of a specific intent on the part of the defendant to not comply with the FCRA. The contrary interpretation of the term by the Ninth Circuit raises substantial questions

about the constitutionality of the statute in light of the Constitution's substantive limits on punitive damages awards. For offenses such as those created by the FCRA – which occur purely in the economic realm, pose no risk to the health or safety of individuals, and do not target any particular set of persons – the absence of a requirement that the defendants have engaged in conduct knowing that it was unlawful would draw into significant question every award of punitive damages under the FCRA.

ARGUMENT

The Ninth Circuit's published decision in *Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, was applied immediately in several unpublished opinions issued the same day. That interpretation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, has produced four petitions for writs of *certiorari*: *Hartford Fire Ins. Co. v. Reynolds*, No. 06-82; *Safeco Ins. Co. of Am. v. Burr*, No. 06-84; *Geico Gen. Ins. Co. v. Edo*, No. 06-100; and *State Farm Mut. Auto. Ins. Co. v. Willes*, No. 06-101.

All four *certiorari* petitions challenge the Ninth Circuit's unduly expansive view of what showing is sufficient to establish that a defendant "willfully" violated the FCRA so as to trigger the availability of statutory and punitive damages. Each of the four petitions is an appropriate vehicle in which the Court could address that important question on which the circuits are divided because each of the Questions Presented on the "willfully" issue appears adequately broad to allow the Court to resolve all the necessary issues.

Three of the petitions also seek review of the Ninth Circuit's erroneous construction of a different and equally important provision of the FCRA that defines "adverse action" for various purposes, including for when businesses must provide certain notices to consumers. This "adverse action" issue affects the day-to-day operations of financial services entities subject to the FCRA and could pose substantial compliance burdens on them with no material benefit to consumers regardless of how the "willfully" issue is

resolved. These three petitions thus merit review by this Court on the adverse action issue as well.

This Court would benefit from granting *certiorari* in all four cases because each petitioner could add valuable depth and focus to the statutory arguments as well as useful clarity in light of the varied factual circumstances present in each case. To the extent, however, that the Court is inclined to grant *certiorari* only in a single case and hold the other related petitions pending its disposition, the petition in *State Farm*, No. 06-101, appears to be the best vehicle for the Court to address the "adverse action" and "willfully" provisions of the FCRA. The scope of the Question Presented in each of the petitions on the "adverse action" issue is somewhat different. The question in the *State Farm* petition,[2] however, is broad and encompasses the question in *Geico*.[3] Also, resolution of the question in *State Farm* is antecedent to the question in *Hartford*,[4] which focuses only on the required content of an adverse action notice and not on the threshold question of whether a notice is required.[5]

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[2] "Whether the Ninth Circuit Court of Appeals erred in interpreting key statutory terms in the definition of 'adverse action' in the Fair Credit Reporting Act, 15 U.S.C. § 1681a(k)(1)(B)(i), so as to expand the reach of that definition far beyond its plain meaning, thus substantially increasing the statutory obligations on insurance companies to notify consumers of purported 'adverse actions' and creating vastly expanded potential liabilities under the statute?" *State Farm*, No. 06-101, Pet. at i.

[3] "Whether the Ninth Circuit improperly expanded § 1681m of FCRA by holding that an 'adverse action' has occurred and notice is required thereunder, even when a consumer's credit information has had either no impact or a favorable impact on the rates and terms of the insurance that would otherwise have been offered or provided?" *Geico*, No. 06-100, Pet. at ii.

[4] "Whether the Ninth Circuit erred in creating new and open-ended disclosure requirements for adverse action notices beyond the discrete list expressly set forth in Section 615 of FCRA, 15 U.S.C. § 1681m(a)." *Hartford*, No. 06-82, Pet. at i.

[5] A factor that may become significant arose in the *Hartford* case subsequent to the filing of that petition. Hartford has informed the Securities and Exchange Commission that, after it filed its petition for *certiorari* in this matter, "the parties entered into a memorandum of

(Continued on following page)

I. Review Is Warranted To Correct The Ninth Circuit's Expansive Interpretation Of The FCRA's "Adverse Action" Definition, Which Otherwise Will Have A Substantial Negative Effect On The Conduct Of The Financial Services Industry Nationwide

The Ninth Circuit erroneously interpreted the term "adverse action" for purposes of the FCRA in a manner that is contrary to the plain language of the statute. In doing so, the Ninth Circuit held that any consumer who does not receive the lowest possible rate has suffered an adverse action, that every entity that participates in that action is liable for failure to provide an adverse action notice, and that each adverse action notice must contain detailed information far beyond that identified in the FCRA itself. The potential impact of this erroneous ruling on the insurance industry is quite significant, and its impact may extend far beyond to other industries as well.

A. The Ninth Circuit's Holding That The Failure Of A New Customer To Receive The Lowest Possible Rate Constitutes An "Adverse Action" By The Insurer Will Require The Issuance Of Millions Of Useless Notices And Is Wrong As A Matter Of Statutory Interpretation

Under the FCRA, if an insurance company takes an "adverse action" with respect to a consumer in connection with its underwriting decision, based at least in part on a consumer report that it obtained in connection with the underwriting under 15 U.S.C. § 1681b(a)(3)(C), the insurance company must provide the consumer with notice of the adverse action. *See id.* § 1681m(a)(1). The FCRA

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understanding setting forth the essential terms of a class settlement in this action. The settlement is subject to certain contingencies, including preliminary and final approval by the district court." The Hartford Financial Services Group, Inc., Quarterly Report (Form 10-Q), at 86 (July 27, 2006).

defines the term "adverse action" for insurance as "a denial or cancellation of, *an increase in any charge for*, or a reduction or other adverse or unfavorable change in the terms or coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance." *Id.* § 1681a(k)(1)(B)(i) (emphasis added).

The Ninth Circuit erroneously held that the phrase "an increase in any charge for" insurance coverage includes an initial purchase of new insurance where the consumer is charged a rate that is higher than what the consumer would have been charged if his score, based on information from his consumer report, was the "top potential score." *State Farm*, No. 06-101, Pet. App. 43a. Under that interpretation, an adverse action occurs whenever a "consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable." *Ibid.*

1. The Ninth Circuit's unprecedented interpretation of the term "adverse action" to include issuance of anything but the best insurance coverage at the lowest possible rate will force insurance companies, and possibly other financial services institutions, to issue tens of millions of pointless notices to consumers.

The effect of the Ninth Circuit's holding on insurance companies will be dramatic. Only a small number of consumers will receive the lowest possible rate for insurance when those rates are based in part on information from the consumer reports. At many insurance companies that rely in part on such information to set rates, fewer than 15% of insureds receive the best rate available. *See* Michigan Office of Financial and Insurance Services, *The Use of Insurance Credit Scoring in Automobile and Homeowners Insurance*, Apps. C & D (2002). As a result, the Ninth Circuit's holding will require insurance companies to provide adverse action notices to nearly all consumers who purchase insurance, *i.e.*, all but the small group who have the "best" scores and receive the lowest possible rates. Because the majority of consumers nationwide must obtain automobile and/or homeowner's insurance, the Ninth Circuit's holding will require businesses to produce and send tens or hundreds of millions of additional adverse action

notices each year. *See* C.A. Br. for Property Cas. Ins. Ass'n of Am. as *Amici Curiae* Supporting Pet. for Reh'g *En Banc* at 2 (filed Nov. 14, 2005) (insurers in 2005 issued approximately 24 million homeowners policies and 48 million – personal automobile policies using credit information).

Congress could not have intended such an absurd result. The Federal Trade Commission cautioned Congress to this effect when Congress was addressing revisions to the FCRA. It explained how important it was "to avoid a situation where in essence everyone is getting an adverse action notice because no one ever gets the absolute best rate." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong., 529 (2003) (testimony of Joel Winston, Associate Director, Bureau of Consumer Protection, Federal Trade Comm'n).

That deluge of additional notices will provide consumers with little, if any, appreciable benefit, and may, in fact, harm consumers. For example, the notices may confuse or mislead consumers who receive insurance at favorable rates because of their good credit histories, but not at the lowest possible rates. In addition, as more adverse action notices are provided, there is a real risk that the effectiveness of the notices intended by Congress will be substantially diluted. Consumers may begin to treat the notices as boilerplate disclosures that should be ignored. *See Senate Hearings*, *supra*, at 95-96 (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n) ("[I]f you give notices too widely and in too many circumstances, then it * * * becomes something that people ignore."); *cf. Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) (discussing problem of "informational overload").

Also, the flood of additional notices will undercut their statutorily intended function – focusing consumers on potential material inaccuracies in their consumer reports. For example, a consumer with a good credit history who obtains insurance at a favorable rate, but receives an adverse action notice, could spend unnecessary time investigating a consumer report for material inaccuracies that do not exist.

2. The Ninth Circuit's interpretation of "adverse action" is contrary to the plain language of the FCRA. The relevant portion of the statute specifies that an adverse action occurs only if consumer report information is used, in whole or in part, to "increase [the] charge for" insurance coverage for that consumer. As a result, if a consumer receives *the same rate or a better rate* than she would have received if her consumer report information had not been considered, an adverse action has not occurred because the consumer report information did not result in an increase in the charge for the insurance coverage for that consumer.

The FCRA adverse action notice requirements are triggered when information in a consumer report has an actual and negative impact on a consumer's insurance rate. They do not address a hypothetical comparison of the rate charged to the consumer with the rate available to all other consumers with "more favorable" consumer report information.

The statutory framework confirms this point. Each adverse action notice entitles the recipient to a free consumer report from the consumer reporting agency. *See* 15 U.S.C. § 1681j(c). If Congress had intended the FCRA adverse action requirements to generate free consumer reports to nearly all consumers, Congress would not have needed to amend the FCRA in 2003 to require that consumer reporting agencies provide consumers with a free consumer report once each year upon request, *see id.* § 1681j(a)(1)(A), because the only consumers not already receiving them would be the small number of consumers with the top credit scores who have no need for them.

3. There is a risk that the Ninth Circuit's holding may be extended beyond insurance to credit transactions and other transactions governed by the FCRA, which would increase the number of adverse actions notices astronomically, burying consumers in paper. *Cf. Senate Hearings*, *supra*, at 48 n.15 (statement of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n) (each day, two to three million consumer reports subject to the FCRA are issued).

Application of the adverse insurance ruling in this case should not apply in the context of credit because the FCRA

specifies that, in the credit context, the term "adverse action" "has the same meaning as in" the Equal Credit Opportunity Act. 15 U.S.C. § 1681a(k)(1)(A). That Act, in turn, defines "adverse action" to mean "a denial or revocation of credit," 15 U.S.C. § 1691(d)(6), and its implementing regulations make clear that if a consumer applies for credit at a specific rate but the lender makes a counteroffer at a different rate, there is no adverse action if the consumer accepts the lender's counteroffer, *see* 12 C.F.R. § 202.2(c).

There is yet another definition of "adverse action" in the FCRA, however, that at least one court has applied in the credit context. That definition of "adverse action" provides that an adverse action is one that is "made in connection with an application * * * made by, or a transaction * * * initiated by, any consumer" and is "adverse to the interests of the consumer." 15 U.S.C. § 1681a(k)(1)(B)(iv). Congress intended this "miscellaneous" definition to apply to transactions other than credit or insurance, as indicated by the transaction-specific definitions of adverse action and the legislative history. *See Senate Hearings*, *supra*, at 53 & n.46 (statement of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n). The Seventh Circuit, however, in a conclusory opinion that finds no basis in the statute, erroneously held that the "miscellaneous" definition can apply to credit transactions. *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 982 (7th Cir. 2004).

There is a significant risk that courts could conclude that, under the Ninth Circuit ruling at issue here, if a consumer is charged a rate for credit that is higher than the rate that the consumer would have been charged if his or her credit score was the "top potential score," the lender has taken an action that is "adverse to the interests of the consumer" within the miscellaneous definition of "adverse action" in the FCRA. The extension of the Ninth Circuit's erroneous interpretation to credit transactions could have a dramatic adverse effect on the compliance activities of banks and other lenders, similar to the effect of the Ninth Circuit's decision on insurance companies.

B. The Ninth Circuit's Holding That All Parties Who Participate In A Transaction That Results In An Adverse Action Are Liable For A Failure To Provide An Adverse Action Notice Threatens To Disrupt Settled Expectations Of The Financial Services Industry

The Ninth Circuit held that all parties who participate in an insurance adverse action are liable for any failure to provide an adverse action notice. *State Farm*, No. 06-101, Pet. App. 47a. The Ninth Circuit opined that Congress did not "intend[] that only a single company be responsible * * * when a consumer is charged an increased rate for insurance." *Id.* at 48a. The Ninth Circuit found that when a consumer is charged an increased rate for insurance and no adverse action notice is provided, the party that makes "the decision as to which of the" affiliated insurance companies will issue the policy will be subject to liability along with the company that issues the policy. This holding finds no statutory basis in the FCRA.

The Ninth Circuit's ruling threatens to expand the reach of FCRA liability for insurance transactions to banks and other lenders, far beyond the intent of Congress. Courts may be persuaded that a bank or other lender is deemed responsible, along with an insurance company, for the failure to provide an adverse action notice in connection with an "increase in the charge" for certain types of insurance coverage that are closely related to credit products. For example, a bank may obtain mortgage insurance to protect the bank from a borrower's default on a mortgage loan. If the bank selects the mortgage insurance company to underwrite the policy based on consumer report information, the Ninth Circuit's interpretation suggests that the bank could be liable under 15 U.S.C. § 1681s(b) along with the insurance company for failure to provide an adverse action notice if the rate charged for the mortgage insurance is not the lowest possible rate.

Similarly, if a consumer wishes to obtain credit-life or credit-disability insurance to protect against default on a credit product obtained from a bank and the bank selects

the insurance company that will receive the consumer's insurance application based on consumer report information, a bank might face liability under 15 U.S.C. § 1681s(b) in the Ninth Circuit if the rate charged for the insurance is not the lowest possible rate and no adverse action notice is provided.

The potential effect of such an interpretation would be significant. Banks and other lenders could find themselves facing enforcement actions for an insurance adverse action that they did not take.

II. Review Is Also Warranted On The Proper Interpretation Of The FCRA's "Willfully" Requirement To Correct The Ninth Circuit's Expansive And Erroneous Interpretation That Permits Recovery Of Unwarranted Punitive Damages And Enables Nationwide Class Actions For Statutory Damages

The Ninth Circuit's substantial relaxation of the "willfully" requirement for the award of statutory and punitive damages under the FCRA imposes significant liability not intended by Congress. The FCRA ensures that any individual who has been injured as a result of a negligent violation of certain of the FCRA's obligations is entitled to compensatory relief for that injury. 15 U.S.C. § 1681o(a)(1). In addition, where a defendant "willfully failed to comply" with such FCRA obligations, *id.* § 1681n(a), Congress authorized uncapped punitive damages and statutory damages of at least $100 and up to $1,000 for each consumer.

The Ninth Circuit held that in order to establish willfulness, a plaintiff need not establish that a defendant knew its action violated the law, even though such knowledge is an essential part of the typical definition of willfulness employed when punishment is involved. *See, e.g., Bryan v. United States*, 524 U.S. 184, 196 (1998); *Ratzlaff v. United States*, 510 U.S. 135, 149 (1994). Instead, relying on a short line of cases that involve extending statutes of limitations and doubling lost wages awards for labor law violations, the Ninth Circuit held that a plaintiff can

establish that a defendant acted "willfully" by demonstrating that the defendant acted "either knowing that the policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *State Farm*, No. 06-101, Pet. App. 53a.

The Ninth Circuit acknowledged that its "reckless disregard" view of the *mens rea* required to establish "willfully" under the FCRA conflicts with both the Sixth Circuit and the Eighth Circuit. *State Farm* Pet. App. 54 n.17. As all the petitioners demonstrate, the Ninth Circuit's standard to determine "willfully" is also contrary to the great weight of other circuit authority.

A. The Ninth Circuit's Ruling Will Permit A Dangerous Array Of Class Actions Seeking Millions Of Dollars In Statutory Damages Without Any Proof Of Actual Harm

By adopting a more lenient standard than most (if not all) other circuits, the Ninth Circuit has become a magnet for nationwide class action lawsuits alleging a variety of technical violations of the FCRA. *See Safeco*, No. 06-84, Pet. at 13 & n.5 (citing recent filings); *see also Hartford*, No. 06-82, Pet. at 23 (hundreds of class actions alleging FCRA violations have been filed in the past two years). This is so because an allegation of "willfully" permits a plaintiff (or, more realistically, an attorney who identifies certain technical violations of the FCRA and then locates a plaintiff in whose name to bring a class action) to demand statutory damages of up to $1,000 on behalf of each member of a class, a remedy not available for negligent violations under Section 1681o.

By avoiding the need to establish actual damages, if any, incurred by each individual member of a class, a "willfully" allegation increases the likelihood that a class composed of a large number of individuals will be certified as a damages class action under Federal Rule of Civil Procedure 23(b)(3). *See, e.g., Ashby v. Farmers Ins. Co. of Oregon*, 2004 WL 2359968 (D. Or. Oct. 18, 2004) (class of at least 130,000 insureds); *Cavin v. Home Loan Ctr., Inc.*,

2006 WL 1313191 (N.D. Ill. May 10, 2006) (class of approximately 49,000 members); *In re Farmers Ins. Co., Inc., FCRA Litigation*, 2006 WL 1042450 (W.D. Okla. Apr. 13, 2006) (class of over one million insureds).

Respondent Willes's complaint in the *State Farm* litigation, which is typical of other alleged FCRA violations plaintiffs seek to litigate as class actions, made no claim that petitioners' actions were negligent or that she personally suffered any actual damages. Instead, her complaint at the time it was dismissed by the district court alleged only willful misconduct and sought only statutory and punitive damages on behalf of a class. *State Farm* Third Amended Complaint (D. Or. Dkt. No. 35) at 4. The allegations in the three other FCRA cases in which *certiorari* petitions are pending are also silent as to the actual harm, if any, suffered by the named plaintiffs and likewise seek only non-compensatory damages for a class.

The driving force for such class actions is not compensation for individual harm, but attorneys intent on extracting money for themselves and a class of uninjured consumers from companies that provide valuable services (and their shareholders) that may have engaged in unknowing technical violations of a complex regulatory statute. *Cf. id.* at 4 ¶ 18 (respondent's counsel "are experienced in class action securities litigation").

The size of these suits, and the risk of hundreds of millions (if not billions) of dollars in statutory or punitive damages, sometimes can enable plaintiff attorneys to successfully obtain tens (if not hundreds) of millions of dollars in settlements from entities that can show they acted in good faith, but cannot be certain that they could defeat the Ninth Circuit's unorthodox standard of "willfully." *See* note 5, *supra*; Fed. R. Civ. P. 23, Advisory Committee's note (1998) (money class actions may force many defendants "to settle rather than incur the costs of defending a class action and run the risk of ruinous liability"); *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (class action for statutory damages "could create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem*

effect on defendants, which may induce unfair settlements"); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.); *In the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.), *cert. denied*, 516 U.S. 867 (1995).

B. The Ninth Circuit Ignored That A "Willfully" Finding Triggers The Availability Of Punitive Damages, A Disfavored Penal Remedy Subject To Significant Constitutional Limitations

A finding that a defendant acted "willfully" allows an award of punitive damages in suits for all violations of FCRA that can be privately enforced. By reading the term "willfully" to encompass states of mind other than a knowing violation of the law, the Ninth Circuit ignored basic rules of statutory construction that weigh against such a low threshold for recovery of punitive damages.

1. Punitive damages are an "extraordinary sanction." *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979). "[B]y definition [they] are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and deter him and others from similar extreme conduct." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981). Punitive damages "serve the same purposes as criminal penalties," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003), and "have been described as 'quasi-criminal,'" *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (citation omitted).

The rule of lenity applies to statutes that authorize punitive damages because punitive damages impose penal sanctions. *See* 3 Norman J. Singer, *Sutherland Statutory Construction* § 59.2, at 121 (6th ed. 2001) (collecting cases applying rule of lenity to statutes awarding punitive damages). The application of the rule of lenity to determine the meaning of "willfully" in the FCRA is particularly apposite because the FCRA's felony provisions require the government to prove that a person acted "willfully" in order to establish criminal liability. *See* 15 U.S.C. §§ 1681q,

1681r; *Ratzlaff*, 510 U.S. at 143 ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

Thus, to the extent that the term "willfully" is ambiguous, it must be read narrowly for purposes of the felony provisions and the punitive damages provisions to protect defendants from punishment. *See Ratzlaff*, 510 U.S. at 148 ("were we to find [the statute's] 'willfulness' requirement ambiguous * * *, we would resolve any doubt in favor of the defendant"). The Ninth Circuit, however, in conflict with other circuits, rejected the reading most favorable to defendants and did not require that plaintiffs show that a defendant had a specific intent to violate the FCRA.

2. The structure of the FCRA weighs strongly in favor of requiring a plaintiff to establish specific intent in order to recover punitive damages. The FCRA is a technical statute that, even decades after its enactment, is still the subject of much uncertainty. When Congress uses the term "willfully" in such "highly technical statutes" that present "the danger of ensnaring individuals engaged in apparently innocent conduct," a defendant must know "that his conduct was unlawful" in order to be liable. *Bryan*, 524 U.S. at 194-195.

In enacting the FCRA, Congress did not permit monetary remedies for every action that is later determined by a court to violate the FCRA. By limiting recovery of even actual damages to instances where a plaintiff can show a negligent violation of certain FCRA provisions, Congress necessarily understood that those subject to the FCRA could reasonably, *i.e.*, non-negligently, engage in conduct that violates the FCRA and that no damages should be awarded in such instances, regardless of the injuries incurred by the plaintiff.

Furthermore, the legislative history confirms that Congress rejected proposals permitting the award of statutory or punitive damages for gross negligence, a term often used interchangeably with recklessness. *See Safeco*, No. 06-84, Pet. at 20-21 (describing legislative history); *Geico*, No. 06-100, Pet. at 22 (same). For all these reasons,

the Ninth Circuit erred in not reading the FCRA "willfully" requirement to incorporate a specific intent standard.

The court of appeals disregarded this analysis and, instead, adopted the recklessness standard that this Court employed in interpreting the term "willful" in the Age Discrimination in Employment Act (ADEA) and the Fair Labor Standards Act. *State Farm*, No. 06-101, Pet. App. 53a (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)). In neither of those statutes, however, does the willfulness determination trigger an award of punitive damages.

In one provision common to both statutes, at issue in *McLaughlin*, a willfulness finding extends the statute of limitations for bringing suit from two years to three years. *See* 29 U.S.C. § 255(a). In another provision under the ADEA, at issue in *Thurston* and *Hazen Paper*, a finding of willfulness permits a court to award an amount equal to the amount of lost wages as liquidated damages. *See* 29 U.S.C. § 626(b). That liquidated damages remedy, this Court has held, is "compensation, not a penalty or punishment" and serves as remuneration for "damages too obscure and difficult of proof," *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-584 (1942), and as a substitute for prejudgment interest, which is not available, *see Powers v. Grinnell Corp.*, 915 F.2d 34, 39-41 (1st Cir. 1990) (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715-716 (1945)). The Court made clear that the term "willful" in those statutes was ambiguous and that its meaning in any statute is dictated by the history and structure of the statute. *See McLaughlin*, 486 U.S. at 132-133 (reviewing structure of statute and legislative history); *Thurston*, 469 U.S. at 125-128 (same).

3. Finally, the requirement that a federal statute be read to avoid doubt about its constitutionality also supports an interpretation of the term "willfully" to require a showing by a plaintiff of a specific intent on the part of the defendant to not comply with the FCRA. The contrary interpretation of the term by the Ninth Circuit

raises substantial questions about the constitutionality of the statute in light of the Constitution's substantive limits on punitive damages awards.

The Due Process Clause prohibits unreasonable punitive damages awards and "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). In assessing reprehensibility, a court must consider whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Ibid.*

Under these factors, the FCRA requirement that a plaintiff establish that a defendant "willfully" failed to comply with the FCRA in order to be eligible for punitive damages must be interpreted to require proof that a defendant knew that its conduct violated the FCRA so as to not raise constitutional doubt. For offenses such as those created by the FCRA – which occur purely in the economic realm, pose no risk to the health or safety of individuals, and do not target any particular set of persons – the absence of a requirement that the defendant engaged in conduct "knowing or suspecting that it was unlawful" would draw into significant question every award of punitive damages under the FCRA. *Gore*, 517 U.S. at 576; *see id.* at 580 ("the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists").[6]

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[6] The FCRA authorization of statutory damages raises the same serious constitutional doubt under the Ninth Circuit's interpretation because the Due Process Clause prohibits the award of statutory damages that have no relationship to the amount of actual injury

(Continued on following page)

There is no basis in the text, structure, or history of the FCRA that would sustain the Ninth Circuit's minority view of "willfully." Yet given the availability of nationwide class actions, the Ninth Circuit's view will be the one to which defendants will often be subjected. Such a holding requires immediate review from this Court.

CONCLUSION

For the reasons set forth above and in the petitions for writs of *certiorari*, the Court should grant all the petitions. To the extent this Court grants a single petition, it should grant the petition in *State Farm Mutual Automobile Insurance Co. v. Willes*, No. 06-101, and hold the remaining petitions pending decision in *State Farm*, and then dispose of them as appropriate in light of that decision.

Respectfully submitted,

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suffered unless there is a showing of specific intent to violate the law. *See Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482 (1915) (statutory damages of $100 per day for refusing customer phone service violated due process when company's action was in good faith, impartially applied, consistent with longstanding practice, and done in the absence of any state ruling that conduct was unreasonable, rulings elsewhere that like conduct was reasonable, and weight of differing opinions on company's side); *see also Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 351 (1913) (statutory damages of $500 for overcharging customer $3 violates due process because damages were "grossly out of proportion to the possible actual damages").

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HARTFORD FIRE INSURANCE COMPANY, PETITIONER

v.

JASON RAY REYNOLDS, RESPONDENT

SAFECO INSURANCE COMPANY OF AMERICA, *ET AL.*, PETITIONERS

v.

CHARLES BURR, *ET AL.*, RESPONDENTS

GEICO GENERAL INSURANCE COMPANY, *ET AL.*, PETITIONERS

v.

AJENE EDO, RESPONDENT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *ET AL.*, PETITIONERS

v.

JULIE WILLES, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR FREEDOMWORKS FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Fair Credit Reporting Act requires an insurance company to notify a consumer of an "adverse action" whenever it offers a policy at a rate greater than the rate the company might have offered if the consumer had perfect credit.

2. Whether an insurance company may be liable for punitive damages for "willful" violation of the Fair Credit Reporting Act based solely upon a finding that it acted with "reckless disregard" of the statutory notice requirement.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

In the decisions below, the Ninth Circuit has interpreted the Fair Credit Reporting Act (FCRA) in a way that not only conflicts with decisions in other circuits, but also, because of the Ninth Circuit's importance in our national economy, threatens to undo many of the benefits that FCRA has heretofore provided to both consumers and businesses nationwide. The Ninth Circuit's expansive interpretation of FCRA's notice requirement threatens to increase the costs of compliance for users of credit information while decreasing the likelihood that consumers will actually benefit from "adverse action" notices. Moreover, in its equally expansive interpretation of the "willfulness" standard for punitive damages, the Ninth Circuit has departed from the near-uniform position of other federal courts of appeals, opening the door to punitive awards even where users of credit information relied in good faith on the advice of counsel in determining their obligations under the statute. These results are not consistent with the text or structure of FCRA, and they threaten to disrupt the efficiency of the consumer credit market and increase the costs of credit nationwide—to the ultimate detriment of consumers. This Court's intervention is urgently needed to avoid that unfortunate result.

FreedomWorks Foundation, like its affiliate FreedomWorks (formerly known as Citizens for a Sound Economy), has a strong interest in these cases. It is a nonprofit, nonpartisan organization dedicated to promoting free-market solutions to economic problems at the state and national levels. Indeed, for more than two decades, FreedomWorks and its predecessors and affiliates have been a leading voice on a range of economic policy

issues, from taxation and regulation to entitlement reform, competitiveness, and consumer protection.[1]

FreedomWorks is especially interested in the proper interpretation and application of the Fair Credit Reporting Act (FCRA). In 2003, FreedomWorks' chief economist testified before a congressional subcommittee on the effectiveness of FCRA and the importance of uniform national standards for sharing financial information. See *Fair Credit Reporting Act: How It Functions for Consumers and the Economy: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 108th Cong. 66-68, 229-233 (2003) (statement and testimony of Wayne T. Brough). As he explained there, FreedomWorks believes FCRA has been instrumental in creating an efficient and highly integrated framework for sharing consumer credit information, a framework that has produced greater opportunities for consumers to obtain such credit. FCRA's success results from a well-considered policy not to restrict the free flow of information, but to provide reasonable standards that protect consumer privacy.

FreedomWorks believes this Court should grant review and reverse the decisions below to give FCRA the uniform nationwide interpretation that its plain terms require, and to ensure that the statute continues to foster the efficient consumer credit market that Congress contemplated.

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT

"In recent years, there has been a proliferation of class action lawsuits brought under the [FCRA]," in part because of "the availability of fee shifting and statutory damages, and the lack of a class action damages cap." David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. Law. 931, 931 (2006). In nationwide class actions, these statutory damages—$100 to $1000 per violation—threaten insurance companies and other covered entities with "crushing liability" that could have "adverse effects on both the national economy and * * * employees." *Trans Union LLC* v. *FTC*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of certiorari).

The cases now before the Court are nationwide class actions filed in the District of Oregon. The named plaintiffs allege that their insurers (and all those companies' affiliates) willfully violated FCRA by failing to provide notice of "adverse actions" that resulted from evaluation of applicants' credit information. The named plaintiffs seek statutory damages of $100 to $1000 for each class member, as well as punitive damages and attorney's fees. The district court granted summary judgment in favor of the insurance companies, but the Ninth Circuit reversed.

The Ninth Circuit held that the defendants in these nationwide class actions were not entitled to judgment as a matter of law and that the named plaintiffs' claims should be decided by juries. *First*, the court adopted an expansive definition of "adverse action" for purposes of FCRA's notice requirement. FCRA provides that any person who "takes any adverse action with respect to any customer that is based in whole or in part on any information contained in a consumer report" must give "notice of the adverse action to the consumer." 15 U.S.C. § 1681m(a). With respect to insurance, the statute defines an "adverse action" as "a denial or cancellation of, an

increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." *Id.* § 1681a(k)(1)(B)(i).

According to the Ninth Circuit, "an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price." *Reynolds* v. *Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1091 (9th Cir. 2006). Thus, "whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA" and must provide an adverse-action notice. *Id.* at 1092. According to the Ninth Circuit, FCRA "requires such notices whenever a consumer pays a higher rate because his credit rating is less than the top *potential* score." *Id.* at 1093 (emphasis added).

Second, the court held that the insurance companies could be liable for "willful" violations of the notice requirement even if they sought, and relied on, the advice of counsel in determining that notice was not necessary. The statute provides that "[a]ny person who willfully fails to comply with any requirement under [FCRA] with respect to any consumer is liable to that consumer" for actual (or statutory) damages, punitive damages, and attorney's fees. 15 U.S.C. § 1681n.

Following the Third Circuit—but contrary to decisions of the Sixth, Seventh, and Eighth Circuits—the Ninth Circuit held that the term "willfully" in FCRA "entails a conscious disregard of the law, which means either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in *reckless disregard* of whether the policy [or action] contravened those rights." *Reynolds*, 435 F.3d at 1098 (emphasis added) (quotations omitted).

In adopting this reckless-disregard standard for willfulness, the court expressed concern about "perverse

incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" *Id.* at 1099. "Because a reckless failure to comply with FCRA's requirements can result in punitive damages," the court reasoned, "insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute." *Ibid.* Under the Ninth Circuit's rule, a company's liability for punitive damages now depends upon whether its counsel's advice is "tenable, albeit erroneous" or "implausible" and "indefensible." *Ibid.*

SUMMARY OF ARGUMENT

The decisions below warrant review because they misinterpret FCRA in ways that will both impede the effectiveness of information-sharing in the consumer credit market and increase the cost of doing business. By requiring insurers to give notice to consumers whenever they charge a rate, based on the consumer's credit information, that is higher than the rate they would otherwise charge, the decisions below significantly increase the cost of FCRA compliance and effectively require that notice be given to every insurance applicant whose credit rating is less than perfect. Moreover, reading the statute to require notice to consumers in such a broad range of circumstances threatens to dilute the effect of credit-related notices that consumers *do* need to receive—by converting "adverse action" notices into white noise that consumers will come to ignore.

What is more, by lowering the bar of liability for "willful" violations, the decisions below impose significant burdens on insurance companies (and others) that merely use credit information for legitimate risk assessment purposes.

All of these results upset Congress's calibration of regulatory requirements and portend higher costs for

consumers seeking credit without providing them with corresponding benefits. And the effect will be felt by millions of consumers, because the notice requirement applies to all users of credit reports, the "adverse action" definition applies to all insurance companies that rely on credit reports, and the "willful" violation provision applies even more broadly—to every business that is covered by FCRA. Indeed, since these cases are nationwide class actions, the decisions below not only pose a danger of devastating liability for the insurance companies involved, but they may also effectively set nationwide standards of both liability and care.

Equally important, the decisions below represent a departure from the standards applied in most other courts of appeals throughout the country. Division among the courts of appeals on an issue affecting so many businesses itself warrants a grant of certiorari. Disparity undermines the chief virtue of FCRA—uniform standards governing national markets.

But the Ninth Circuit's decisions pose an additional threat. Given the circuit's expansive territory and the scope of the markets its rulings govern—comprising nearly 20 percent of the Nation's gross domestic product in 2004—the decisions below will also create extraordinary pressure for firms operating nationwide to conform their conduct in *all* jurisdictions to the court's broad reading of FCRA's notice requirements, simply to avoid having to enforce divergent notice policies in different offices. Thus, absent this Court's intervention, the Ninth Circuit's decision may, as a practical matter, be the last word on the standard that many companies apply in seeking to comply with FCRA. But that makes no sense: the authoritative interpretation of FCRA should come from this Court, not a single court of appeals that happens to have a large geographic jurisdiction.

ARGUMENT

The decisions below reflect fundamental misreadings of two key provisions of FCRA that affect millions of credit transactions nationwide. By construing the notice requirement to apply whenever a consumer obtains credit on terms less advantageous than might be available to a hypothetical "perfect" consumer, the decisions below impose significant burdens on users of credit reports while diminishing the utility of adverse-action notices to consumers. And by construing the term "willful" to include mere recklessness, the decisions below ensure that users of credit reports will face heightened risks of punitive damages liability that can be mitigated only by second-guessing the advice of counsel and interpreting FCRA in the most restrictive manner possible. The decisions below thus place on FCRA a judicial gloss that imposes significant additional compliance costs on businesses, but without corresponding benefits to consumers.

I. The Ninth Circuit's Expansive Reading Of FCRA's Notice Requirement Is Far Broader Than Congress Intended, To The Ultimate Detriment Of Consumers.

As this Court has noted, "Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 23 (2001) (citing 15 U.S.C. § 1681(a)). To accomplish these objectives, the statute regulates "consumer reporting agencies" that generate "credit reports" for use in determining consumers' eligibility for credit, insurance, and employment. See 15 U.S.C. §§ 1681a, 1681b. Under the statute, reporting agencies are required to take steps to assure accuracy in credit information, to limit the disclosure of credit information to appropriate parties, and to give consumers access to their credit information so they can correct any mistakes. See *id.* §§ 1681(b), 1681b, 1681g.

In addition, FCRA regulates *users* of credit reports such as the insurance companies here. See *id.* § 1681m. Insurance companies, like other credit providers, use credit reports in assessing risks. Under FCRA, users of credit reports must give consumers notice of so-called "adverse actions" taken based on their credit information. *Id.* § 1681m(a)(1). As shown below, the Ninth Circuit has misinterpreted these provisions, and has done so in a way that threatens to destroy many of FCRA's benefits to consumers and businesses alike.

A. The Ninth Circuit's Interpretation Of FCRA's "Adverse Action" Provision Is Inconsistent With The Statutory Text.

FCRA defines "adverse action" in various commercial contexts, including the extension of credit, provision of insurance, employment decisions, and government licensing. See *id.* § 1681a(k)(1). In the insurance context, an "adverse action" is "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." *Id.* § 1681a(k)(1)(B).

Nothing in the statute, however, compels the Ninth Circuit's conclusion that an adverse-action notice is required "whenever a consumer pays a higher rate because his credit rating is *less than the top potential score*." *Reynolds*, 435 F.3d at 1093 (emphasis added). Indeed, the statute makes no reference to the hypothetical perfect credit rating. Rather, it focuses on a *change* in the price or terms of insurance offered to a specific consumer with specific actuarial characteristics as well as a specific credit rating. If a consumer receives an offer of insurance at a certain price and on certain terms based on non-credit-related characteristics, he is adversely affected by his credit rating only if the insurer, after considering the credit rating, *changes* the offer by raising the price or reducing the coverage or otherwise making the terms less

favorable. The relevant comparison is between (1) the consumer described by all his characteristics except his credit rating and (2) the same consumer described by all his characteristics including his credit rating. It is not between the real-life consumer and the Platonic Form of creditworthiness.

B. The Ninth Circuit's Interpretation Of FCRA's "Adverse Action" Provision Undermines The Policy Objectives Of The Statute.

Not only does the Ninth Circuit's rule exceed the plain meaning of the statute and defy common sense, but it also upsets the delicate balance of interests that Congress struck when it enacted the statute. Congress enacted FCRA recognizing that "[t]he banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. § 1681(a)(1).

1. Reliable credit information is essential to risk assessment and pricing decisions in the consumer credit market. As FreedomWorks' chief economist has explained, there is "a strong statistically significant correlation" between "credit scores [and] loss." *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 232 (testimony of Wayne T. Brough). "Overall, research and creditor experience has consistently indicated that credit reporting company information, despite any limitations that it may have, generally provides an effective measure of the relative credit risk posed by prospective borrowers." Robert B. Avery, *et al.*, *An Overview of Consumer Data and Credit Reporting*, Federal Reserve Bulletin 47, 51 (Feb. 2003).

Thus, it should come as little surprise that insurance companies use credit information for legitimate risk-assessment purposes:

> [I]nsurance companies have used the information in credit scores as a risk characteristic to help predict future losses. This allows companies to price products more efficiently, while covering their costs. Risk classification allows insurers to divide individuals into groups with similar claims and set prices based on the probability of future loss. Driving history, age and gender are common variables to classify risk, but increasingly insurance scores with credit have been found to be more reliable predictors of future risk.

Fair Credit Reporting Act: How It Functions for Consumers and the Economy, *supra*, at 67 (statement of Wayne T. Brough).

Insurers' use of credit information helps consumers in two distinct ways. First, it enables insurers to set prices for insurance based on likely risk, which keeps them from setting prices unnecessarily high. "Restricting credit history information as an underwriting tool," by contrast, "would result in higher costs for insurers and higher premiums for policyholders." *Id.* at 233 (testimony of Wayne T. Brough).

Second, use of consumer credit histories improves the fairness of risk classification and thereby increases the availability of insurance to classes of consumers who otherwise might go without coverage. "[W]hen consumer credit histories are used as an underwriting criterion, they tend to increase the fairness and accuracy of risk classification. * * * With the ability to classify risk more accurately, insurers gain the ability to provide a wider array of products that can be offered to customers they otherwise could not serve." *Id.* at 232 (testimony of Wayne T. Brough).

2. This is in keeping with Congress' own goals in passing FCRA. Even as Congress recognized that "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers," it sought to respond to the

"need to [e]nsure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(3)-(4). Thus, FCRA reflects Congress' judgment on the appropriate balance of efficiency in the credit market and reasonable consumer protection: it "strikes a balance between the privacy interests of consumers with respect to the contents of their credit reports and the need of businesses to access the information required to make accurate real time assessments of consumer qualifications." S. Rep. No. 108-166, at 5 (2003).

FCRA promotes efficiency in the consumer credit market by maintaining credit providers' ability to make decisions based on consumers' actual experiences. At the same time, however, FCRA protects consumers by ensuring that they are made aware of the impact of their credit reports in the marketplace. Indeed, FCRA's notice requirement facilitates the free flow of information by requiring users of credit information to alert consumers when they are "taxed"—by higher rates or less favorable terms—because of their credit ratings. These adverse-action notices benefit consumers by (1) showing them how their credit standing affects their position in the marketplace, and (2) enabling them quickly to identify and correct errors in their credit reports.

The balance that Congress struck in FCRA between allowing businesses to use credit histories while providing consumers with notice of genuinely adverse credit-related actions has been vindicated by the performance of the nation's consumer credit market. Credit is available to more consumers today than ever before, undoubtedly (at least in part) because FCRA created a uniform national system of credit reporting that promotes efficiency in information-sharing, accuracy in risk assessment, and privacy for consumers. As one Federal Reserve Board official told Congress: "The ready availability of accurate, up-to-date credit information from consumer reporting

agencies benefits both creditors and consumers. Information from consumer reports gives creditors the ability to make credit decisions quickly and in a fair, safe and sound, and cost-effective manner. Consumers benefit from access to credit from different sources, vigorous competition among creditors, quick decisions on credit applications, and reasonable costs for credit. *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 431 (testimony of Dolores Smith).

3. By requiring insurers to notify consumers of an "adverse action" every time insurers use consumer credit histories as a basis for charging a rate higher than the lowest hypothetical rate, the Ninth Circuit's reading of FCRA increases the cost of using such credit information and threatens harm to consumers both in the form of increased prices and decreased availability for those who are at risk of not getting coverage. This Court's review is warranted to prevent that result.

Moreover, gratuitous adverse-action notices actually *undermine* the important functions that Congress intended such notices to perform. The more notices a consumer receives, the less importance he will attach to any particular notice and the less attention he will pay to all such notices. As the director of the Federal Trade Commission's Bureau of Consumer Protection has explained, "if you give notices too widely and in too many circumstances, then it * * * becomes something that people ignore. The adverse action notice, as it was originally envisioned, fit well in the set of circumstances where consumers needed to pay attention to the credit report and did not raise a lot of false alarms." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Housing, & Urban Affairs*, 108th Cong. 95-96 (2003) (testimony of J. Howard Beales, III).

By requiring that notice be given "whenever a consumer pays a higher rate because his credit rating is less than the top potential score," *Reynolds*, 435 F.3d at 1093, the Ninth Circuit has ensured that there will be "a lot of false alarms" that will only devalue appropriate adverse-action notices. And by requiring that such notices identify *every affiliated entity* that participates in setting premium rates, see *id.* at 1096, the Ninth Circuit has ensured that consumers will be flooded with gratuitous information concerning a single transaction. Under the court of appeals' view, credit notices that consumers would ordinarily want to know about will be drowned out by the white noise of numerous meaningless reports that the court's expansive interpretation of "adverse action" requires.

In sum, the decisions below substitute the Ninth Circuit's theory of regulation for Congress' judgment on national economic policy. Requiring notice virtually every time an insurance company provides an initial policy—even when the consumer's credit information had no impact or a favorable impact on his ability to obtain credit—amounts to over-regulation that imposes additional costs on insurance companies without delivering additional benefits to consumers. This Court should grant the petitions to give a uniform interpretation to FCRA's notice requirement, one that is consistent with Congress' policy objectives and protective of consumers' interests in obtaining credit.

II. Contrary To The Decisions Of Most Other Circuits, The Decision Below Subjects Covered Businesses To Punitive Damages For Unwitting Violation Of FCRA's Requirements, Thereby Increasing The Cost Of Credit To All Consumers.

The Court should grant review for the additional reason that the decisions below aggravate a conflict among the federal courts of appeals on the meaning of the term

"willful" in FCRA. The Act subjects insurance companies to liability for actual damages, statutory penalties, *punitive damages*, and attorney's fees for "willful" violations of statutory requirements. See 15 U.S.C. § 1681n(a). As this Court has explained, "willful" is a term of "many meanings," and its proper interpretation is "often dependent on the context in which it appears." *Bryan* v. *United States*, 524 U.S. 184, 191 (1998); *Ratzlaf* v. *United States*, 510 U.S. 135, 141 (1994); *Spies* v. *United States*, 317 U.S. 492, 497 (1943).

In FCRA, Congress made a considered decision to reserve the drastic remedies of penalties and punitive damages for only the most egregious violations. The original Senate bill required the plaintiff to show that the defendant was "grossly negligent" to obtain *actual* damages, and that the violation was "willful" to obtain *punitive* damages. See S. 3678, 91st Cong. §§ 616, 617 (1970). Because gross negligence is equivalent to recklessness, see *Restatement (Second) of Torts* § 282 cmt. e (1965), the effect of the Senate bill was to distinguish misconduct that was merely reckless from misconduct that was more egregious, *i.e.*, "willful." Likewise, the House distinguished recklessness from willfulness, rejecting alternative versions of FCRA that would have authorized punitive damages for violations that were "grossly negligent or willful." See H.R. 19403, 91st Cong. § 52 (1970); H.R. 19410, 91st Cong. § 52 (1970). Thus, it was the unmistakable intention of Congress to set apart conduct that was more egregious than gross negligence (or recklessness) for punitive damages liability.

This policy is also manifest in FCRA's structure. For example, Section 1681n authorizes damages for "willful" violations in two different circumstances. For "willful" violations of most FCRA requirements, the statute provides that the consumer may receive actual damages of "not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A). For "willful" violations of the prohibition against "obtaining a consumer report under false

pretenses or knowingly without a permissible purpose," the statute provides that the consumer may receive the greater of her actual damages or $1,000. *Id.* § 1681n(a)(1)(B). Because (1) "willful" must have the same meaning in both circumstances, see *Ratzlaf*, 510 U.S. at 143, and (2) the statute speaks of "willful" violation of a prohibition against obtaining a consumer report "*knowingly* without a permissible purpose," the term "willful" must entail *at least* actual knowledge in this context as well.[2]

Consistent with the legislative history and statutory structure, most federal circuits that have addressed the issue have concluded that a defendant may be liable for "willful" violation of FCRA only where it knowingly and consciously violated statutory mandates. *E.g.*, *Wantz* v. *Experian Info. Solutions*, 386 F.3d 829 (7th Cir. 2004); *Phillips* v. *Grendahl*, 312 F.3d 357 (8th Cir. 2002); *Dalton* v. *Capital Associated Indus., Inc.*, 257 F.3d 409 (4th Cir. 2001); *Duncan* v. *Handmaker*, 149 F.3d 424 (6th Cir. 1998); *Stevenson* v. *TRW, Inc.*, 987 F.2d 288 (5th Cir. 1993).[3] As the Eighth Circuit explained in *Phillips*, "the defendant must commit the act that violates the Fair Credit Reporting Act with knowledge that he is committing the act * * * *and* he must also be conscious that his act impinges on the rights of others." 312 F.3d at

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[2] FCRA also provides a criminal penalty for "any person who *knowingly and willfully* obtains information on a consumer from a consumer reporting agency under false pretenses." 15 U.S.C. § 1681q (emphasis added).

[3] Although the Third Circuit previously adopted a "reckless disregard" standard, even that court recognized that a defendant's conduct must be "on the same order as willful concealments or misrepresentations" to warrant punitive damages. *Cushman* v. *Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997).

368 (emphasis added). Thus, in most federal circuits, a company cannot be liable for punitive damages where it mistakenly, but not deliberately, violates FCRA's notice requirement.

Not only does the Ninth Circuit's expansive interpretation of "willful" conflict with the interpretation uniformly applied by these other circuits, but it also creates significant practical problems for covered businesses and their counsel. Under the Ninth Circuit's rule, a business subject to FCRA may be charged with a "willful" violation—and thus be subject to punitive damages—*even if it did not know that it was violating the statute at all*, and even if it was merely following the advice of counsel on an unsettled legal issue under the statute.

Perhaps even more troubling is the Ninth Circuit's suggestion that a user of credit reports is subject to punitive damages for violating FCRA if its counsel's advice is "untenable" or "implausible" in the eyes of the court of appeals, *regardless of the fact that the district court agreed with its counsel's interpretation of the statute.* Indeed, the district court in these cases granted the insurance companies judgment as a matter of law on the ground that their interpretation of FCRA was correct.

Moreover, the burden appears to rest on the *defendant* to refute the claim for punitive damages: According to the Ninth Circuit, a business may be liable for punitive damages unless it "diligently and in good faith" sought to determine its statutory obligations and "thereby" took a "reasonable" or "tenable" position under the statute. *Reynolds*, 435 F.3d at 1099. Under this rule, the named plaintiff need do no more than assert that the defendant "willfully" (or without a good-faith basis) violated FCRA to survive a motion to dismiss.

This result increases the likelihood that covered businesses will bear the costs of punitive damages awards, either by paying large judgments or by entering into

"blackmail settlements" reflecting the potential for a high punitive award. As Judge Easterbrook has explained, settlement in such large-scale litigation "becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." See *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-1016 (7th Cir. 2002); see also Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) ("[w]hile the benefits to the individual class members are usually minuscule, the possible consequences of a judgment to the defendant are so horrendous that these actions are almost always settled").

In addition, this result will compel businesses to incur additional costs, either in conducting their operations in the most conservative manner, or in obtaining "second opinions" to test their own counsel's advice. This Court has recognized that, "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law." *Upjohn Co.* v. *United States*, 449 U.S. 383, 392 (1981) (quotations omitted). And that is especially true in areas where compliance is "hardly an instinctive matter." *Ibid.* There is a cost associated with asking lawyers to approve business practices, and a risk associated with not asking. The pernicious effect of the decisions below is to *increase the cost* of the most responsible corporate behavior—consulting legal counsel before engaging in business practices regulated by federal statute. See *ibid.* (acknowledging the "valuable efforts of corporate counsel to ensure their client's compliance with the law").

These costs undoubtedly will be passed on to consumers, who will receive no additional benefit beyond that which ordinary remedies would provide. Here again, then, the decisions below amount to over-regulation by a court, inconsistent with the careful balance of interests that Congress struck when it enacted FCRA. The Ninth

Circuit's decisions undermine Congress' choice to reserve punitive damages for deliberate, conscious misconduct and conflict with the decisions of most other federal circuits, to the certain detriment of consumers nationwide. This Court should grant review to resolve the settled conflict among the courts of appeals and to establish a single standard for punitive damages liability under FCRA.

III. The Decisions Below Are Of Enormous Practical Importance Not Only To The Financial Services Industry, But To Consumers Of Their Services.

The practical impact of the decisions below also weighs heavily in favor of review. FCRA touches millions of consumer credit transactions each day, and it affects the routine business operations of banks, credit unions, insurance companies, mortgage lenders, and retailers nationwide. Given the scope of the statute's operation and the importance of consumer credit to our economy, the effects of the decisions below will reach far beyond the particular transactions at issue in these four cases. Indeed, as FreedomWorks' chief economist has explained: "[FCRA] has allowed the United States to develop one of the most efficient and sophisticated financial services markets in the world. Seventy-five percent of all households are participants in the market for consumer credit or mortgages." *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 66 (statement of Wayne T. Brough).

Because FCRA regulates enormous numbers of credit-related transactions, the decisions below likely will spawn massive amounts of new litigation, the costs of which ultimately will be borne by consumers. "Each of the three national credit reporting companies has records on perhaps as many as 1.5 billion credit accounts held by approximately 190 million individuals. Credit reporting companies generally receive information from creditors and others every month, and they normally update their

credit records within one to seven days of receiving new information. According to industry sources, each of the three national credit reporting companies receives more than 2 billion items of information each month." Avery, *et al.*, *supra*, at 49. That is ample fodder for FCRA litigation, and because FCRA does not cap the amount of damages recoverable in a class action, the Court can be certain that new litigation will be large-scale and very expensive. See D. Permut & T. Moore, *supra*, at 931.

Moreover, simply because of the sheer size of the Ninth Circuit's territory in relation to the national economy, the decisions below likely will force financial services companies to modify or curtail their activities on a nationwide basis, resulting in further harm to consumers. In 2004, the nine States comprising the Ninth Circuit had gross state products totaling more than $2.3 trillion—nearly 20 percent of the Nation's gross domestic product for that year.[4] California's gross product alone was nearly $1.5 trillion,[5] making California's the sixth-largest economy in the world.[6] Insurance-related activities contributed more than $42.5 billion to the economies of the States comprising the Ninth Circuit,[7] and in 2005 more

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[4] See United States Department of Commerce, Bureau of Economic Analysis, *Gross State Product*, available at http://www.bea.gov/bea/regional/gsp.htm (visited Aug. 21, 2006).

[5] See *id.*

[6] See California Legislative Analyst's Office, *CalFacts 2004: California's Economy and Budget in Perspective*, available at http://www.lao.ca.gov/2004/cal_facts_2004_calfacts_econ.htm (visited Aug. 21, 2006).

[7] See Bureau of Economic Analysis, *supra*.

than $91.4 billion in direct premiums for property and casualty insurance were written in these States.[8]

To compensate for the added costs of providing gratuitous adverse-action notices and obtaining multiple legal opinions before engaging in practices regulated by FCRA—as required by the Ninth Circuit's decisions—banks, insurance companies, and other covered businesses may change the terms of the credit they extend or the prices or availability of products they sell to consumers nationwide. As a result, if the decisions below are allowed to stand, fewer consumers will have access to credit on terms advantageous to them.

* * * * *

The decisions below rest on fundamental misreadings of FCRA that significantly increase the costs of compliance with the statute. Users of credit reports and other covered businesses will pay those costs, but only in the first instance. They will pass those costs on to consumers, for whose benefit FCRA was enacted, in the form of higher prices and a narrower range of coverage. The decisions below thus amount to judicial over-regulation of the consumer credit market, and they should not be permitted to jeopardize FCRA's continued success in promoting the free flow of credit information while protecting consumer privacy.

CONCLUSION

The petitions for a writ of certiorari should be granted.

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[8] See Insurance Information Institute, *Direct Premiums Written, Property/Casualty Insurance By State, 2005*, available at http://www.economicinsurancefacts.org/economics/state/premiums.htm (visited Aug. 21, 2006).

Respectfully submitted.

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IN THE

Supreme Court of the United States

HARTFORD FIRE INS. CO.,

Petitioner,

v.

JASON RAY REYNOLDS,

Respondent.

[Captions continued on inside cover]

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE MORTGAGE INSURANCE COMPANIES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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[Captions continued from outside cover]

GEICO GENERAL INSURANCE CO., ET AL.,
Petitioners,

v.

AJENE EDO,
Respondent.

STATE FARM MUT. AUTO. INS. CO., ET AL.,
Petitioners,

v.

JULIE WILLES,
Respondent.

SAFECO INS. CO. OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

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INTEREST OF THE *AMICUS CURIAE* [1]

The Mortgage Insurance Companies of America ("MICA") is a non-profit trade association that represents the private mortgage insurance industry in the United States. Its members are United Guaranty Corporation, Genworth Mortgage Insurance Corporation, Mortgage Guaranty Insurance Corporation, PMI Mortgage Insurance Co., Republic Mortgage Insurance Co., and Triad Guaranty Insurance Corporation.

MICA's members provide private mortgage insurance to mortgage lenders. Mortgage insurance protects a lender if the homeowner defaults on the loan. It allows those lenders to make low-downpayment loans, thereby expanding homeownership opportunities and enabling millions of Americans to become homeowners. Taken together, the private mortgage industry's seven companies insure over five million mortgages nationwide.[2]

MICA works to enhance understanding of the vital role that private mortgage insurance plays in housing Americans and of the issues faced by the mortgage insurance industry. Among MICA's missions is providing information to decisionmakers on issues concerning the obligations of companies that provide mortgage insurance. As such, MICA participates as *amicus curiae* in cases that may substantially affect such companies. See, *e.g.*, *Verex Assurance, Inc. v. Palma*, 519 U.S. 1048 (1996) (granting MICA's motion for leave to file an *amicus curiae* brief).

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[1] Written consents of all parties have been filed with the Clerk. This brief was authored solely by counsel for MICA, and no person or entity other than MICA, its members, or its counsel made any monetary contribution to the preparation or submission of the brief.

[2] The seventh company, Radian Guaranty Co., is not currently a member of MICA.

Mortgage insurers write policies with premium terms that may vary based on, among other things, information about the potential homeowner's creditworthiness. As a result, MICA's members have a strong interest in having this Court immediately review and correct the Ninth Circuit's decision for three reasons.

First, each of MICA's members has recently been sued in putative class actions arising under the Fair Credit Reporting Act ("FCRA") in which the plaintiffs allege, *inter alia*, that the mortgage insurers willfully violated FCRA by not providing notices of adverse action when the mortgage insurance policy premiums were affected by the borrowers' credit scores.[3] The Ninth Circuit's decision addresses issues that are also raised by those lawsuits, including the proper standard for determining whether any FCRA violation was willful, thus subjecting the defendant to punitive sanctions. Indeed, shortly after the Ninth Circuit's initial opinion was issued, it was cited by the plaintiffs in two of the cases pending against private mortgage insurers.[4]

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[3] See *Glatt v. PMI Group, Inc.*, No. 2:03-CV-00326-JES (M.D. Fla.); *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04-CV-00004-JHM (W.D. Ky.); *Preston v. Mortgage Guar. Ins. Corp. of Milwaukee*, No. 5:03-CV-111-Oc-10GRJ (M.D. Fla.); *Price v. United Guar. Residential Ins. Co.*, No. 3:03-CV-2643-R (N.D. Tex.); *Portis v. Gen. Elec. Mortgage Ins. Corp.*, No. 04-CV-300 (N.D. Ill.); *Karwo v. Gen. Elec. Mortgage Ins. Corp.*, No. 04-CV-1944 (N.D. Ill.); *Brantley v. Republic Mortgage Ins. Corp.*, No. 04-CV-805 (D.S.C.). In addition, a similar case is pending against Radian. *Whitfield v. Radian Guar. Co.*, No. 05-5017 (3d Cir.).

[4] See Plaintiff's Notice of Supplemental Authority, filed in *Whitfield v. Radian Guar., Inc.*, No. 04-111 (E.D. Pa. Aug. 11, 2005); Plaintiff's Notice of Supplemental Authority in Opposition to Triad's Motion for Summary Judgment, filed in *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04-CV-00004-JHM (W.D. Ky. Aug. 19, 2005).

Second, because the decision below conflicts with prior decisions from other Circuits, review is necessary to prevent forum shopping in future cases involving MICA's members. Mortgage insurers write policies covering properties located across the country, thereby raising a grave risk of forum shopping if the circuit split demonstrated in the petitions is allowed to persist.

Finally, beyond its effects on litigation, the Ninth Circuit's ruling would cause substantial harm to the private mortgage insurance industry and American homeownership. As explained below, the decision affects all aspects of FCRA, not just issues relating to adverse action notices, and will pressure mortgage insurers to consider adopting overly cautious practices in order to avoid the risk of punitive damages. The inevitable result of unnecessarily conservative approaches will be a restricted flow of consumer information, higher costs, and a decreased availability of risk-based priced mortgage insurance.[5]

ARGUMENT

The petitions in these cases correctly demonstrate that the Ninth Circuit's ruling both directly conflicts with decisions of numerous other courts of appeal and is patently wrong as a matter of statutory construction. The Ninth Circuit incorrectly construed the word "willfully" in 15 U.S.C. § 1681n as permitting an award of statutory and punitive damages whenever an appellate court concludes in hindsight that the defendant's position on an issue of first impression was "implausible," even if it was informed by legal advice about this complex statute.

As we now show, immediate correction of that idiosyncratic and erroneous ruling is vitally important. First, as

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[5] MICA respectfully reserves its members' rights to argue, at an appropriate time and in an appropriate context or forum, the application of the Ninth Circuit's opinion to a particular set of facts.

we show in Part I, the Ninth Circuit's decision will impact a wide swath of the economy, extending far beyond the circumstances of the individual cases before the Court. Although these cases primarily involve the adverse action notice requirements in the context of automobile insurance, the decision below will affect compliance with all of FCRA's substantive provisions by a broad array of industries. Second, as we show in Part II, the Ninth Circuit's ruling will immediately cause serious problems across the wide sweep of its impact. It will increase litigation and promote forum shopping in class actions against companies with multistate operations, like MICA's members; it will unduly pressure companies using consumer information in all of those nationwide operations, thus raising costs and effectively nullifying the contrary decisions of the other Circuit courts that have correctly interpreted the law; and it will inappropriately undermine the attorney-client privilege. These effects will be particularly pronounced because FCRA is a complex statute with numerous unresolved issues, each of which will be directly affected by the Ninth Circuit's ruling that "implausible" answers to unresolved issues can merit an award of punitive damages. Finally, these many adverse effects will be particularly problematic because, as Congress determined in enacting FCRA, the efficient flow of consumer information and the balancing of consumer and industry interests is of vital importance to the American economy.

I. THE DECISION BELOW WILL HAVE IMPACTS FAR BEYOND THE PARTICULAR CIRCUMSTANCES OF THESE CASES, INCLUDING ON THE MORTGAGE INSURANCE INDUSTRY

The cases before the Court primarily involve an alleged failure to comply with FCRA's adverse action notice requirement in the context of automobile insurance sales. But the Ninth Circuit's eccentric and wrongheaded articu-

lation of the standard for what constitutes a "willful" violation of FCRA will, absent correction, both affect numerous other industries, including mortgage insurance, and impact compliance with all of the Act's requirements, not only the giving of adverse action notices in the context of the use under certain circumstances of credit scores.

A. FCRA Affects Much of the Economy

FCRA affects a wide array of businesses. It imposes obligations not only on consumer reporting agencies (15 U.S.C. §§ 1681b, 1681v), but also on companies that furnish information to consumer reporting agencies (*id.* § 1681s-2) and, in certain circumstances, on users of information contained in consumer reports (*id.* § 1681m). Thus, although petitioners in these cases primarily are personal lines automobile insurers, the Ninth Circuit's interpretation of FCRA will impact many other segments of the economy. Indeed, as a general matter, retailers, employers, and government agencies each use consumer information for various purposes.[6]

The same is true throughout the housing industry. First, insurance companies that write homeowner's insurance policies frequently use the homeowner's credit scores in determining the premiums for such insurance.[7] Second, most companies that make mortgage loans use the homeowners' credit information in underwriting the risks of mortgage loans and determining the interest rates and other terms for those loans.[8] Finally, credit information may also be used in connection with the private mortgage insurance issued by MICA's members. Mortgage insurance policies are issued to

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[6] S. Rep. No. 103-209, at 1–2 (1993).

[7] See, *e.g.*, S. Rep. No. 108-166, at 7 (2003).

[8] *Id.*; see also U.S. Gen. Accounting Office, GAO Report No. 06-435, Mortgage Financing: HUD Could Realize Additional Benefits from its Mortgage Scorecard 5 (Apr. 2006) (discussing use of automated underwriting of loans using borrower credit scores).

mortgage lenders to protect them against the risk of payment defaults by the homeowners. The premium charged to the lender by the mortgage insurer is based on a variety of factors, including, in certain types of mortgage insurance policies, information contained in the homeowners' consumer reports. Indeed, as cited above, MICA's members are defendants in putative class actions alleging that they use consumer information and have disclosure duties under 15 U.S.C. § 1681m.

B. The Ninth Circuit's Willfulness Ruling Is Likely To Have an Impact on all of the Act's Substantive Provisions

FCRA imposes a variety of substantive duties beyond the adverse action notice provisions that the Ninth Circuit considered. For example, section 1681b sets forth permissible purposes for which consumer reporting agencies may furnish, and third parties may receive, consumer report information. 15 U.S.C. § 1681b. Sections 1681c, 1681g, and 1681i impose requirements with respect to the types of information that a consumer reporting agency may include in a consumer report, how consumer reporting agencies must disclose such information to consumers, and how disputes over accuracy are resolved by such agencies and by information furnishers. *Id.* §§ 1681c, 1681g & 1681i. Section 1681m imposes duties on users of information in consumer reports in certain circumstances. *Id.* § 1681m. And section 1681s-2(b) provides procedures for investigations by entities that furnish consumer information into certain disputes over the accuracy of consumer information. *Id.* § 1681s-2(b).

Moreover, the Act's provisions are not limited to the use of credit information, which was at issue in these cases. The duties under FCRA arise from use of information in consumer report[s], a term that Congress defined to include not only credit information, but also "any information * * * bear-

ing on a consumer's * * * character, general reputation, personal characteristics, or mode of living." *Id.* § 1681a(d)(1). That definition has been construed to include such data as driving record information,[9] social security numbers, and even nicknames.[10]

With some exceptions where private suits are barred (*e.g.*, *id.* § 1681s-2(c)), FCRA authorizes an award of statutory and punitive damages against "[a]ny person who willfully fails to comply with *any* requirement imposed under this subchapter." *Id.* § 1681n(a) (emphasis added). Thus, the Ninth Circuit's interpretation of the word "willfully" may affect compliance with, and lawsuits involving, a large number of FCRA's requirements. There are, for example, dozens of lawsuits now pending in which plaintiffs are seeking punitive damages on the ground that creditors and insurers did not make firm offers of credit or insurance when they sent out so-called "prescreened" solicitations to consumers, and thus allegedly violated FCRA restrictions on obtaining consumer information for such purposes under section 1681b.[11]

In short, the Ninth Circuit's redefinition of the term "willfully" in section 1681n will affect a vast array of entities and all of FCRA's numerous requirements, and hence amply justifies review by the Court.

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[9] See FTC Staff Letter from William Haynes to Matthew B. Halpern (June 11, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/halpern.htm.

[10] See *Yang v. GEICO*, 146 F.3d 1320 (11th Cir. 1998).

[11] See, *e.g.*, *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006); *Putkowski v. Irwin Home Equity Corp.*, 423 F. Supp. 2d 1053 (N.D. Cal. 2006); *Pearson v. Novastar Home Mortgage, Inc.*, No. 05-1377-A, 2006 U.S. Dist. LEXIS 36282 (M.D. La. Mar. 28, 2006).

II. THE NINTH CIRCUIT'S DIVERGENT AND ERRONEOUS DECISION WILL CAUSE PROBLEMS ACROSS THE BROAD SWEEP OF ITS IMPACT

The Ninth Circuit's decision will not just sweep broadly; it will cut deep. It will, with respect to the Act's unresolved issues, promote forum shopping, skew and complicate compliance, and undermine the attorney-client privilege. Those impacts will be particularly pronounced because FCRA is, in fact, a complicated statute that presents many unresolved issues. And this pronounced effect is especially problematic because, as Congress found, the flow of consumer information is critical to the American economy, including the housing market—which is why the Act strikes a balance between business and consumer interests that the Ninth Circuit's ruling threatens to upset.

A. The Circuit Split Created by the Ninth Circuit Will Result in Forum Shopping and More Litigation, Skew Compliance, and Undermine the Attorney-Client Privilege

As noted above, mortgage insurers provide insurance on millions of mortgages nationwide. Absent prompt correction, the Ninth Circuit's acknowledged refusal to adopt the interpretation of FCRA reached by other Circuits will lead to extensive forum shopping and increased class action filings and will adversely affect efforts to comply with the statute.

The decision below threatens to make district courts in the Ninth Circuit the forums of choice for FCRA nationwide class actions. The ability to pursue claims for statutory and punitive damages dramatically increases the potential damages under FCRA; indeed, unlike other federal statutes such as the Truth in Lending Act and the Fair Debt Collection Practices Act, FCRA does not cap a defendant's liability in class actions. As such, the ruling below, by creating a lessened standard of proof for "willful" violations, will di-

rectly drive the calculus as to where plaintiffs will file suit. Because mortgage insurers carry out their activities on a nationwide basis, plaintiffs will have the opportunity to try to file their FCRA class action cases in the Ninth Circuit, thus avoiding the other circuit court decisions that apply a sensible reading of the key statutory term. Indeed, starting immediately after the Ninth Circuit's initial opinion, numerous FCRA class actions have been filed in the Ninth Circuit—including by residents of far-off jurisdictions such as Georgia and Tennessee.[12] Allowing the conflict created by the decision below to persist thus would give a green light to massive forum shopping. Moreover, by lowering the standard for statutory and punitive damages, the decision below likely will lead to a sharp increase in filing of new FCRA class actions, thereby raising costs and increasing artificial settlement pressures.

The ruling below will also skew the efforts of mortgage insurers to comply with FCRA, raising costs and discouraging the beneficial use of consumer information. As Congress has emphasized, FCRA "seeks to balance the needs of consumers and businesses" with respect to the use of consumer information. S. Rep. No. 103-209, at 2 (1993).[13]

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[12] See *Luther v. 1-800-BAR-NONE*, No. 05 c 4026 (N.D. Cal. Oct. 5, 2005); *Hogan v. PMI Mortgage Ins. Corp.*, No. C05-3851 PJH (N.D. Cal. Sept. 23, 2005); *Holloway v. Homefield Fin. Inc.*, No. SACV 05-0861 (C.D. Cal. Sept. 6, 2005); *Phillips v. Accredited Home Lenders Holding Co.*, No. SACV 05-851 (C.D. Cal. Sept. 1, 2005); *Yeagley v. Wells Fargo & Co.*, No. C05-3403 CRB (N.D. Cal. Aug. 22, 2005); *Putkowski v. Irwin Home Equity Corp.*, No. C05-3289 PJH (N.D. Cal. Aug. 12, 2005).

[13] See also *Stergiopoulos v. First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1045–46 (7th Cir. 2005) (FCRA is an "attempt to achieve this balance between consumer privacy and the needs of a modern, credit-driven economy"); *Ladner v. Equifax Credit Info. Servs., Inc.*, 828 F. Supp. 427, 429 (S.D. Miss. 1993) (FCRA "legislat[es] a balance between the interest of the consumer public and that of financial institutions").

Given the severity of a potential class-action award of statutory and punitive damages if a company's position on an unresolved issue is determined in hindsight to have been "implausible," mortgage insurers, like other companies, will be pressured by the ruling to consider adopting an unnecessarily conservative reading of each of the Act's various requirements. Indeed, the Ninth Circuit's ruling will impose particular burdens on companies with nationwide or multistate operations, like MICA's members, because of the risk from nationwide class actions filed in the Ninth Circuit. It will be cold comfort to such businesses that other Circuits have held that statutory and punitive damages can be awarded only for knowing noncompliance with the Act's requirements. The fact that the Ninth Circuit's decision not only conflicts with, but as a practical matter will *nullify*, the rulings of other appellate courts underscores the urgent need for review by this Court.

Finally, the ruling below will undermine the attorney-client privilege and, in doing so, will weaken rather than enhance compliance with the Act's substantive requirements. As the Ninth Circuit unabashedly acknowledged, its "reckless disregard" standard will routinely put at issue "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." 435 F.3d at 1099. Indeed, given the risk of catastrophic statutory and punitive damages in nationwide class action cases, mortgage insurers and other defendants may, as a practical matter, feel it necessary to disclose the privileged advice they received in an effort to defend themselves. As such, the Ninth Circuit's approach contravenes the strong public interest in protecting attorney-client communications. See, *e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Moreover, by putting such advice routinely at issue, the ruling below will discourage clients from seeking, and lawyers from providing, frank and thoughtful advice with respect to FCRA compliance—lest such advice later be used against the

client as proof of the kind of "creative lawyering" that, under the Ninth Circuit's approach, justifies the imposition of exemplary damages on a defendant. Thus, rather than motivating companies to "seek objective answers from their counsel as to the true meaning of the statute" (435 F.3d at 1099), the decision below will undermine forthright legal advice and true compliance with the Act. Last, still further problems will arise from the Ninth Circuit's assertion (*id.*) that consultation with attorneys and reliance on their advice may not be sufficient to avoid a finding of willfulness if a court concludes in hindsight that the lawyers provided "indefensible answers." That holding places clients in the impossible situation of having to second-guess their attorneys—still further undermining both the privilege and compliance. It can safely be said that Congress never intended such an approach when it enacted section 1681n.

B. These Adverse Effects Will Be Particularly Pronounced Because FCRA Is a Complex Statute that Raises many Unresolved Issues

The Ninth Circuit's holding that a defendant can be held to have acted "willfully" if an appellate court finds its position on an unresolved FCRA issue be "implausible" will have a particularly powerful impact because FCRA is a complicated statute as to which industry has been given little regulatory guidance and which raises many still-unresolved issues.

FCRA is a "complex statutory scheme." *Skwira v. United States*, 344 F.3d 64, 74 (1st Cir. 2003). For example, as directly applicable to these cases, the term "adverse action" is given five separate meanings by the Act. 15 U.S.C. § 1681a(k). There is, moreover, relatively little guidance as to the proper interpretation or application of the Act's complicated provisions. The FTC, which has jurisdiction over certain of the Act's provisions, has no general authority to issue substantive rules under the Act (see 15 U.S.C.

§ 1681s(a)(1); 65 Fed. Reg. 80,802, 80,803 (Dec. 22, 2000)) and, since 2001, has not even issued informal interpretive letters (see http://www.ftc.gov/os/statutes/fcrajump.htm). Indeed, three years ago, Congress enacted the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, a lengthy statute that revised many of FCRA's existing provisions and added numerous new statutory terms, but many of the regulations that Congress required for implementing these new provisions have yet to be issued.

Not surprisingly, given the Act's complexity and limited guidance, numerous issues concerning the Act's interpretation and application remain unresolved. In the instant cases, for example, the Ninth Circuit considered, admittedly as a "matter of first impression," whether an initial insurance premium charge is properly considered an "increase in any charge" and hence can constitute an "adverse action." 435 F.3d at 1090. In ruling that it is, moreover, the court rejected multiple prior district court rulings, including in the case on appeal.[14] The Ninth Circuit also considered, again for the first time, whether an "adverse action" can have occurred when the use of credit information resulted in the consumer receiving a better rate than if credit information has not been considered at all. On this new issue, too, the appeals court rejected the district court's ruling. 435 F.3d at 1092–93.

Similarly, issues relating specifically to the Act's application to mortgage insurance remain unresolved under FCRA. For example, the duties that apply in the event of an "adverse action" depend in part on which of the five prongs of the Act's "adverse action" definition applies. 15 U.S.C. § 1681a(k). Mortgage insurance arises as part of a credit transaction: when a prospective homeowner seeks credit in the form of a mortgage, the lender as part of that credit transaction obtains mortgage insurance in order to insure against

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[14] See, *e.g.*, *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1317 (D. Or. 2003).

the risk it would face if the borrower defaults on a loan and the value of the collateral is insufficient to pay the amount of the outstanding indebtedness. Because mortgage insurance, thus, is an integral part of a transaction in which a consumer is obtaining credit, MICA believes that the so-called "credit" prong applies. *Id.* § 1681a(k)(1)(A). Advocates in cases against MICA's members have argued, however, that the definition of adverse action applicable to the "underwriting of insurance" instead applies. *Id.* § 1681a(k)(1)(B)(i). This unresolved question is crucial; if the credit transaction definition applies, a mortgage insurer is not required to send adverse action notices in circumstances where the consumer obtains the product (a loan) that he or she sought. See 16 C.F.R. pt. 698, app. H, § I.C ("No adverse action occurs in a credit transaction where the creditor makes a counteroffer that is accepted by the consumer.").

Another area of uncertainty concerns whether adverse action notice requirements even apply to mortgage insurers. A federal district court has ruled that mortgage insurers have no duty to send adverse action notices to consumers because mortgage insurers contract with lenders, not consumers, and because they insure lenders' risks, not consumers' risks. *Whitfield v. Radian Guar., Inc.*, 395 F. Supp. 2d 234 (E.D. Pa. 2005), *appeal pending*, No. 05-5017 (3d Cir.). An older, non-binding FTC staff letter disagrees. FTC Staff Letter from Clarke W. Brinckerhoff to Paul H. Schieber at n.1 (Mar. 3, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/schieber.htm.

In short, the Ninth Circuit's adoption of a standard that invites an award of massive statutory and punitive damages for wrong answers to open FCRA issues is particularly pernicious because there are so many open issues under the Act. Immediate correction of that standard is therefore all the more important.

C. These Pronounced Adverse Effects Are Especially Problematic Because the Efficient Flow of Consumer Information Is Vital to the Economy, Including the Housing Industry

The recent widespread advances in technology have dramatically affected the consumer reporting industry.[15] Because of the computerization of records, development of the internet, and ability to transmit data electronically, entities that maintain information about consumer accounts now are able to quickly provide reporting agencies with considerable amounts of information, and entities whose operations are enhanced through the use of consumer information now are able to access it on a timely basis.[16]

This flow of consumer information is vital to the United States economy. In passing FCRA, Congress found that our "banking system is dependent upon fair and accurate credit reporting." 15 U.S.C. § 1681(a)(1). It further found that consumer reporting agencies "have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." *Id.* § 1681(a)(3). Indeed, this Court has found that "Congress enacted the FCRA in 1970 to," *inter alia*, "promote efficiency in the Nation's banking system * * *." *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001).

FCRA facilitates and encourages the efficient flow of consumer information in multiple ways. Congress authorized disclosure by consumer reporting agencies of consumer

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[15] S. Rep. No. 104-185, at 18 (1995) ("the credit reporting industry has grown in the wake of information technology advances that have occurred over the last twenty years").

[16] Robert B. Avery et al., An Overview of Consumer Data and Credit Reporting, Federal Reserve Bulletin, at 49 (Feb. 2003), *available at* http://www.federalreserve.gov/pubs/bulletin/2003/0203lead.pdf (estimating that each consumer reporting agency receives more than two billion items of information each month).

information to various public and private entities in numerous circumstances. 15 U.S.C. § 1681b. It directed companies that maintain information about consumer accounts to furnish such information to consumer reporting agencies in an accurate manner. *Id.* § 1681s-2. Congress also preempted state laws that interfere with FCRA's key provisions. *Id.* § 1681t(b).

The nationwide system created by Congress provides considerable benefits to business and consumers alike. The FTC has noted that "[t]his flow of information [permitted under FCRA] enables credit grantors and others to make more expeditious and accurate decisions, to the benefit of consumers."[17] Among the benefits conferred by the efficient sharing of consumer information are rapid qualification for mortgage, automobile, and retail credit; higher levels of home ownership; more accurate pricing of credit based on risk; and increased availability of non-mortgage credit for low-income households.[18] According to Congress, these benefits have saved consumers as much as $100 billion annually.[19]

In sum, by establishing a standard for punitive damages that will adversely effect the efficient flow of consumer information on a nationwide basis, the Ninth Circuit's ruling undermines Congress's goal of promoting the efficient flow of such information in order to enhance the economy, including the promotion of homeownership. As shown above, FCRA seeks to balance consumer and business interests in the use of consumer information, and the Ninth Circuit's

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[17] Federal Trade Comm'n, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003, at 1 (Dec. 2004), *available at* http://www.ftc.gov/reports/facta/041209factrpt.pdf.

[18] H.R. Rep. No. 108-263, at 23 (2003).

[19] *Id.*

opinion threatens to upend that careful balance. The petitions for review should therefore be granted.

III. THE NINTH CIRCUIT'S ERRONEOUS "ADVERSE ACTION" RULINGS FURTHER WARRANT REVIEW

The need for review is even greater in light of the Ninth Circuit's erroneous reading of the Act's critical adverse action provisions, which will exacerbate the problems described above. First, the Ninth Circuit's conjured requirement that an adverse action notice must "describe the action" taken, "specify the effect of the action upon the consumer," and "identify the party or parties taking the action" (435 F.3d at 1095) is not just unsupported by the statutory text, it will also cause serious practical problems. In the mortgage insurance context, the *lender* decides whether mortgage insurance is needed, the amount of the insurance, whether and to what extent the borrower will be asked to pay the premium, and, in some instances, the rate at which the policy will be issued. Describing the action taken, and the effect on the consumer, in these circumstances could require a complex recitation about the nature of mortgage insurance, the relationship between the lender and the mortgage insurer, and the various mortgage insurance plans that MICA's members offer to mortgage lenders, in order to comply with the Ninth Circuit's new, vague directive. Separately, confusion will likely result if a consumer who has successfully obtained a mortgage loan is simultaneously told that he or she experienced "adverse" action and receives that notice from an entity (the mortgage insurer) with whom he or she has had no dealings of any kind.

Likewise, the Ninth Circuit's holding that adverse action occurs under section 1681m when "because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged" (435 F.3d at 1092) misconstrues the Act's plain language. If there was no

earlier charge, there simply cannot be said to have been "an increase in any charge" (15 U.S.C. § 1681a(k)(1)(B)(i)), and hence there is no adverse action. Likewise, where no credit information has been found, the subsequent pricing decision simply cannot be said to have been "based in whole or in part on any information contained in a consumer report" (*id.* § 1681m(a)), and hence no duties are triggered.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

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IN THE

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HARTFORD FIRE INSURANCE COMPANY,
Petitioner,

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,
Petitioners,

GEICO GENERAL INSURANCE COMPANY, *et al.*,
Petitioners,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

JASON JAY REYNOLDS,
Respondent,

CHARLES BURR, *et al.*,
Respondents,

AJENE EDO,
Respondent,

JULIE WILLES,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Property Casualty Insurers Association of America ("PCI") respectfully submits this *amicus curiae* brief in support of the petitions for writs of certiorari to the United States Court of Appeals for the Ninth Circuit filed by Hartford Fire Insurance Company; GEICO General Insurance Company, GEICO Indemnity Company, and Government Employees Insurance Company; Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon; and State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company (collectively "petitioners").[1]

INTEREST OF *AMICUS CURIAE*

PCI is a trade group dedicated to representing its member companies' interests before governmental bodies and state and federal courts. PCI's members include more than 1,000 property and casualty insurance companies that together account for $184 billion in direct written premiums, including 52% of all personal auto premiums and 39.6% of all homeowners premiums written in the United States.

PCI is familiar with the issues involved in this case, including the issues raised in petitioners' petitions for writs of certiorari. As those petitions demonstrate, this case presents several issues of first impression relating to the interpretation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq.*, each of which is of critical importance to PCI's members and to the insurance industry as a whole. PCI and its member companies thus have a substantial interest in the outcome of the present action.

1. No counsel for any party authored this *amicus* brief in whole or in part, and no person or entity other than PCI made a monetary contribution to the preparation or submission of the brief. All parties have consented to the filing of this *amicus* brief, and their letters are on file with the Clerk of this Court.

In PCI's view, one aspect of the Ninth Circuit's opinion in particular bears further briefing: the required contents of a valid adverse action notice under 15 U.S.C. § 1681m. PCI believes its *amicus* brief will be helpful to the Court in offering a somewhat different approach to this issue than do the parties' petitions and in providing data that underscore the significant negative consequences to the insurance industry and the insurance-buying public if the Ninth Circuit's opinion is allowed to stand.

SUMMARY OF ARGUMENT

The Ninth Circuit's opinion fashions entirely new content requirements for adverse action notices that threaten the very solvency of the insurance industry. These unprecedented requirements are unsupported by any authority and conflict with both the express language of 15 U.S.C. § 1681m ("section 1681m") and with Federal Trade Commission directives written for the express purpose of advising insurers of their obligations under FCRA. These new notice requirements are vague in their scope and application and, given the realities of modern insurance underwriting practices, may be virtually impossible for insurers to meet.

The detailed notice requirements adopted by the Ninth Circuit will also thwart one of Congress's primary objectives in enacting FCRA, which is to provide consumers with clear, intelligible information concerning their credit reports. Combined with the court's expansive definition of "willfulness," imposition of these requirements threatens the insurance industry with potentially ruinous penalties and the prospect of continued litigation. For all these reasons, petitioners' requested writs of certiorari should issue.

ARGUMENT

A. The Decision Below Seriously Threatens the Continued Availability and Affordability of Personal Lines Insurance.

According to the Ninth Circuit's opinion, in order to comply with section 1681m, an adverse action notice must, "at a minimum, . . . communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action." *Reynolds v. Harford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1095 (9th Cir. 2006); *see id.* at 1100. As will be discussed further below, these hitherto unknown requirements conflict with the express language of the statute, run afoul of the dictates of prior case law, and are patently inconsistent with Federal Trade Commission advisory directives written specifically to inform insurers of their obligations under FCRA. If upheld, these requirements could have a potentially devastating impact on the insurance industry, since insurers have for years sent out notices that could be construed to fall short of the Ninth Circuit's newly-minted requirements. In light of the broad standard of "willfulness" adopted by the court (discussed further below), such a construction could subject many insurers to statutory liabilities of staggering proportions.

According to industry data, it is estimated that, in 2005, the number of personal lines policies subject to credit scoring (including both new business and renewals) exceeded 71.5 million.[2] While there are no data stating how many adverse

2. This figure was derived using public information, beginning with the latest personal auto and homeowners exposure counts from the National Association of Insurance Commissioners for those states

(Cont'd)

action notices insurers sent during this same time period, it may conservatively be assumed that approximately 50% of these policies triggered such notices.[3] Based on these assumptions, insurers sent some 35.7 million adverse action

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(Cont'd)

where credit information is allowed. Because each insured automobile constitutes an "exposure," even though more than one auto may be insured on a single policy, the total number of "exposures" was extrapolated and converted into policy counts using data from the Federal Highway Administration and the U.S. Census Bureau. The total policy counts (176.4 million) were then reduced to include only those policies for which credit history was examined. The factors used to generate the final numbers and their sources are as follows:

- Proportion of companies known to use insurance scoring - Michigan Office of Financial and Insurance Services;
- Percentage of the largest auto companies using credit scoring models - Conning & Company;
- Percentage of companies using credit data on new business - Conning & Company;
- Retention ratios (applied to develop breakdown between new business and policy renewals) - Ward Financial Group; and
- Frequency with which renewal policy counts are subject to credit (three years) - National Conference of Insurance Legislators' Model Act Regarding Use of Credit Information in Personal Insurance

These percentages and ratios were then applied to the total policy counts to determine the estimated new and renewal policies affected by the use of credit-based insurance scoring.

3. These percentages obscure the fact that, generally speaking, the use of credit information and other consumer reports enables carriers to charge *lower* rates overall than would otherwise be the case. Thus, a carrier's actions in an individual case might trigger an adverse action notice (e.g., where the applicant's credit standing results in an "increased" premium), even though the applicant is paying less than if the carrier had calculated the premium using a different set of factors that did not include credit information.

notices in 2005 alone, *not* including those sent when an application is denied. Assuming, as it is reasonable to do, that similar numbers of adverse action notices were sent in each of the past five years, carriers have sent approximately 178.5 million adverse action notices since 2001 – many of which could conceivably be vulnerable to *ex post facto* scrutiny based on the Ninth Circuit's new notice requirements.

FCRA provides for statutory damages of between $100 and $1000 per willful violation. 15 U.S.C. § 1681n(a). The Ninth Circuit's overreaching interpretation of FCRA's notice requirements thus potentially exposes the insurance industry to statutory damages alone (not including punitive damages) that could threaten the solvency of many insurers and negatively affect the continued availability and affordability of personal lines insurance. Even without more, but especially in light of these potentially devastating consequences, the Ninth Circuit's erroneous and unsupported interpretation of FCRA's notice requirements warrants this Court's plenary review.

B. The "Minimum Requirements" for a Valid Adverse Action Notice Announced by the Ninth Circuit Are Not Supported by the Statutory Language and Are Inconsistent with the Governing Agency's Interpretation of the Statute.

1. The Ninth Circuit's Interpretation of Section 1681m Conflicts with the Statutory Language and Has No Support in the Case Law.

The purposes of FCRA, and of its notice requirement, are twofold: "to safeguard against the improper reporting of information on a credit report (either by the credit reporting agency or by the furnisher of credit information)" and to guard against "the improper disclosure of a credit report."

Myers v. Bennett Law Offices, 238 F.3d 1068, 1074 (9th Cir. 2001); *see* 15 U.S.C. § 1681(b) (noting that one of FCRA's purposes is to "require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information").

In aid of this goal, section 1681m of the Act sets forth requirements for users of consumer reports, and provides that any person who takes adverse action based in whole or in part on information contained in a "consumer report"[4] shall provide three specific types of information to the consumer, in "oral, written, or electronic" form: (1) notice of the adverse action; (2) contact information for the consumer reporting agency (together with a statement that the agency did not make the decision to take the adverse action and cannot provide information concerning the action); and (3) notice of the consumer's right to obtain a copy of the consumer report and to dispute the accuracy or completeness of any information in the report.[5] 15 U.S.C. § 1681m.

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4. The Act broadly defines "consumer report" as any communication by a consumer reporting agency "bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used . . . as a factor in determining the consumer's eligibility for," among other things, "insurance . . . to be used primarily for personal, family, or household purposes[.]" 15 U.S.C. § 1681a(d)(1).

5. Section 1681m(a) provides:

> If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall–

(Cont'd)

In considering whether the adverse action notices at issue here met these requirements, the Ninth Circuit went well beyond the mandate of the statute. Rather, as noted above, the court concluded that a valid notice must, "at a minimum," specifically state that an adverse action was taken; "describe" the action; "specify the effect" of the action on the consumer; and identify the party or parties taking the action. *Reynolds*,

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(Cont'd)

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically–

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right–

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

435 F.3d 1095; *see id.* at 1100. None of these content requirements is found in section 1681m itself, and none can fairly be implied from the language of the statute.

In support of its holding, the Ninth Circuit cited only *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 150 (5th Cir. 1983), a case that has virtually nothing to do with the issues involved here. In that case, Fischl applied for credit to finance the bulk of the purchase price of an automobile. The credit application was referred to General Motors Acceptance Corp. ("GMAC"), which obtained a consumer report on Fischl. After reviewing the application and consumer report, GMAC determined that credit should not be extended. It then sent Fischl a form letter advising him that his application had been rejected on the ground that "credit references are insufficient." In the portion of the letter designed to disclose the use of information from outside sources, GMAC marked "disclosure inapplicable." *Id.* at 145. Fischl subsequently learned that GMAC had in fact obtained his credit information and filed suit under FCRA.

Not surprisingly, the Fifth Circuit held that GMAC's purported notice failed to comply with section 1681m, since it misleadingly stated "disclosure inapplicable" instead of informing Fischl that GMAC had in fact relied on a consumer report in denying Fischl's loan application. *Id.* at 150. But that is all the *Fischl* opinion says: Other than to make plain that an adverse action notice cannot contain untrue information, the case does not even address the required content of such a notice – much less hold that such a notice is invalid unless it contains the specific and detailed information required by the Ninth Circuit. Indeed, other than the Ninth Circuit here, no court in the country has ever interpreted section 1681m to impose any such requirements.

2. The Ninth Circuit's Interpretation of Section 1681m Conflicts with That of the Federal Trade Commission, the Agency Charged with Enforcing FCRA.

In accord with both the express statutory language and common sense, the Federal Trade Commission – the agency primarily responsible for enforcing the FCRA (*see* 15 U.S.C. § 1681s(a); *Fischl*, 708 F.2d at 149 n.4) – has specifically addressed what information an insurer must provide a consumer in an adverse action notice. In stark contrast to the Ninth Circuit's interpretation, both the FTC's regulations and its advisory materials essentially track the express language of the statute and state that, to be effective, an insurer's adverse action notice need only include "the name, address, and telephone number" of the agency supplying the report; "a statement that the credit reporting agency that supplied the report did not make the decision to take its adverse action"; and a notice of the consumer's right to dispute the information.[6] *See* 16 C.F.R. Part 601, App. C.; "FTC Facts

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6. In *Fischl*, the Fifth Circuit summarized the FTC's role in interpreting FCRA as follows:

> Although it does not possess substantive rule-making power, the FTC is authorized to enforce the FCRA, "except to the extent that enforcement . . . is specifically committed to some other government agency under [§ 1681s(b)]. . . ." §15 U.S.C. 1681s(a). . . . Due to the absence of express statutory authority to issue binding interpretations of the FCRA, which effectively deprives any such interpretation of the force of law, opinions disseminated by the FTC, whether in the form of its compliance manual or unofficial staff letters, are intended only to clarify the FCRA and are advisory in nature. *These opinions may nonetheless offer helpful guidance to the courts.*

708 F.2d at 149 n.4 (emphasis added).

for Business: Consumer Reports – What Insurers Need to Know" (FTC October 1998) (reproduced at PCI's Appendix ("PCI App.") at App. B); *see also* FTC Staff Opinion Letter, dated November 10, 1998, PCI App. at App. A (opining that section 615(a) of FCRA requires adverse action notices to contain "only the information specified" in the statute).

Prior to the decision below, no court had ever suggested, much less held, that an adverse action notice must contain the detailed content required by the Ninth Circuit. Nor can such a requirement be gleaned from a fair reading of the FCRA itself. To the contrary, the only source of specific information concerning the "official" interpretation of this aspect of FCRA – the FTC's regulations and the advisory materials written specifically for insurers – detail a much simpler and straightforward response to consumers in the event of adverse action. A writ of certiorari should therefore issue to review and correct the Ninth Circuit's unjustified and erroneous interpretation of section 1681m's notice requirements.

C. The Ninth Circuit's Notice Requirements Do Not Further FCRA's Purposes and Impose an Unreasonable Administrative and Economic Burden on Insurers.

As noted above, the primary goal of section 1681m is "to promote the accuracy of information in a consumer credit report." *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1334 (9th Cir. 1995). The Ninth Circuit's newly imposed "minimum" requirements are of no assistance whatever in achieving that end. To the contrary, and in contrast to the statutory requirements, the Ninth Circuit's requirements will serve only to impose an enormous operational burden on insurers without providing consumers with any additional information necessary to determine if their credit information is accurate and, if not, how to correct it. Take, for example, the Ninth Circuit's requirement that

the notice "specify the effect of the [adverse] action upon the consumer." *Reynolds*, 435 F.3d at 1095. First, this requirement is impermissibly vague in scope and application, since it is impossible to determine what the phrase "specify the effect" means or what level of detail is necessary to satisfy this criterion.[7] Moreover, assuming an insurer could overcome this threshold hurdle, the complexities of modern insurance underwriting are such that many insurers will simply be unable to provide the information apparently required by the Ninth Circuit – or at least to do so in a form that consumers will understand.

To be sure, some insurers may use credit information in such a straightforward way that the "effect" of the adverse action will be easy to discern and explain – such as when an insured's premium rate is increased solely and directly because of information in his or her credit report. More often, however, the role of consumer reports in the rating process is much more complicated and nuanced, having both direct and indirect ramifications. Insurance companies calculate premiums using various underwriting or rating factors. These factors can be affected in numerous ways by information contained in consumer reports. For example, many insurers use consumer report information to calculate an "insurance score," which is then used to place an applicant in a basic risk category or "tier," such as "preferred," "standard," or "nonstandard." Each of these tiers may have associated rating factors and may also, in turn, determine what other rating parameters are applied. Thus, for example, the fact of a speeding violation (information which itself comes from a consumer report) may affect the "preferred" risk tier differently than the "nonstandard" risk tier. Similarly, an applicant's insurance score may affect whether an applicant

7. Thus, far from providing guidance as to FCRA compliance, the Ninth Circuit's notice requirements threaten to open a Pandora's box of new litigation.

is eligible for certain discounts or surcharges and, if so, the amount of those discounts and surcharges.

This interaction among the various factors that go into the setting of premiums could make it literally impossible for an insurer to "specify the effect" of the "action" taken as a result of information derived from an individual policyholder's consumer reports. The problem is further complicated by the fact that insurers may use information from a number of consumer reports (e.g., credit reports, motor vehicle reports, and others) in setting a premium or determining eligibility for coverage, making any meaningful explanation of the "effect" of the reports virtually impossible. Suppose, for example, a policyholder has "good" credit (as derived from a credit report) and one speeding violation. Through sophisticated statistical techniques, an insurer might be able to derive the *overall* rate impact of these two factors combined, but not be able to separate the impact of the good credit, on the one hand, and the speeding violation, on the other. Just how is the carrier to "specify the effect" of its action in these circumstances?

The end result is that, to satisfy the Ninth Circuit's notice requirements, insurers may be forced to provide consumers with an extremely complicated description of their underwriting practices, corporate structure and business practices. Thus, far from providing clear, intelligible information designed to assist a consumer in determining whether his or her credit information is accurate and to correct it if it is not, the result of the Ninth Circuit's opinion is to impose upon insurers the duty to provide highly complex and detailed disclosures in which the key information contemplated by the statute will be all but lost.

D. The Ninth Circuit's Conclusions on Notice and Willfulness Are Inconsistent with FCRA's Intent and Threaten to Subject the Insurance Industry to Potentially Crippling Penalties.

Violations of FCRA (including the failure to comply with the adverse action notice requirements of section 1681m(a)) subject the users of consumer reports to a variety of civil damages and penalties. "Negligent noncompliance" subjects a user to liability for actual damages sustained by the consumer as a result of the noncompliance, plus court costs and attorney fees in the event of successful litigation. 15 U.S.C. § 1681o(a). If the noncompliance is "willful," the user is additionally liable for statutory damages of between $100 and $1,000 per consumer, as well as for punitive damages. *Id.* § 1681n(a).

As explained by the parties in their petitions, the Ninth Circuit's adoption of a "reckless disregard" standard of willfulness blurs the distinction between negligent and willful conduct and is therefore contrary to this Court's prior holdings.[8] Even were that not so clearly the case, other circuits have concluded – correctly – that the level of culpability required to constitute "willfulness" under FCRA is much higher, reserving its application to situations in which the defendant *knew* the challenged conduct to be unlawful. *See Phillips v. Grendahl*, 312 F.3d 357, 368, 370 (8th Cir. 2002) (noting that "the statute's use of the word 'willfully' imports the requirement that the defendant know his or her conduct is unlawful" and that "willful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law"); *Duncan*

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8. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 129-30 (1985), and *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988), both of which hold that mere negligence does not equal willfulness.

v. Handmaker, 149 F.3d 424, 429 (6th Cir. 1998) ("[I]n order to incur civil liability for operating under false pretenses, a party must act willfully and purposefully 'with a motivation to injure.' [Citation.] This interpretation comports with the language of § 1681n. . . ."). Indeed, the Ninth Circuit specifically acknowledged this split of authority, but opted to follow the "reckless disregard" standard adopted by the Third Circuit in *Cushman v. Trans Union Corp.*, 115 F.3d 220, 229 (3d Cir. 1997).[9] *Reynolds*, 435 F.3d at 1098. On the basis of this conflict alone, the Court should grant the petitions for certiorari.

Beyond this, however, the effect of the Ninth Circuit's erroneous interpretation of the term "willfully" itself warrants review by this Court. If the Ninth Circuit's "reckless disregard" standard were to be applied to all aspects of FCRA compliance, including the content of adverse action notices, major segments of the insurance industry could be subjected to potentially staggering statutory and punitive damages resulting from the routine – and long-approved – use of consumer reports. Given the significant numbers of adverse action notices sent each year, the potential financial penalties are staggering. The alternative is that insurers may be dissuaded from using consumer reports altogether, which would increase the cost of insurance to consumers.

These potential results are far removed from Congress's intent in enacting FCRA, which specifically authorizes the use of consumer reports in the underwriting of insurance. *See* 15 U.S.C. § 1681b. At the same time, the effect of the Ninth Circuit's notice requirements is to seriously disrupt the ability of insurers to do business and, in the final analysis,

9. Although declining to adopt an "actual knowledge" standard, the *Cushman* court was at least careful to point out that, to be actionable as a "willful" violation, the defendant's conduct "must be on the same order as willful concealments or misrepresentations." 115 F.3d at 227. The Ninth Circuit has not similarly qualified its holding.

to harm the very consumers that FCRA was enacted to protect. On this ground as well, this Court should grant the petitions for certiorari to review the Ninth Circuit's ill-considered opinion.

CONCLUSION

For all the reasons discussed above and in the parties' petitions, a writ of certiorari should issue to review the opinion and judgment of the Ninth Circuit below.

Respectfully submitted,

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APPENDIX

APPENDIX A — FTC STAFF OPINION LETTER, DATED NOVEMBER 10, 1998

Federal Trade Commission (F.T.C.)
Division of Financial Practices

Fair Credit Reporting Act

Staff Opinion Letter

November 10, 1998

Mr. Ronald L. Sheffield

Special Assistant Commissioner, Consumer Affairs

Arkansas Insurance Department

1200 West Third Street

Little Rock, AR 72201-1904

Dear Mr. Sheffield:

This will respond to your letter inquiring about the applicability of the Fair Credit Reporting Act ("FCRA") to an insurance company's denial of insurance to an applicant based on information contained in a consumer report. You ask two specific questions: (1) does the FCRA require an insurance company to disclose to an applicant what specific information in the credit report was relied on in denying insurance to that applicant; (2) if not, would the insurance company violate the FCRA by voluntarily disclosing such information to the applicant. The answer is "no" to both questions.

Section 615(a) of the FCRA sets forth the information that must be disclosed to a consumer by any person taking adverse

action[1] with respect to that consumer based in whole or in part on any information contained in a consumer report. That section requires disclosure of only the information specified, namely:

1. Notice (either oral, written, or electronic) of the adverse action;

2. The name, address, and telephone number of the consumer reporting agency ("CRA") from whom the report was obtained. If the CRA compiles and maintains files on consumers on a nationwide basis, the person must disclose a toll-free number for the CRA, which the CRA is required to establish;

3. A statement that the CRA did not make the decision to take the adverse action and is unable to provide the specific reasons why the action was taken; and

4. Notice of the consumer's right to obtain a free copy of his or her consumer report from the CRA and to dispute the accuracy or completeness of any information in a consumer report furnished by the CRA.

The FCRA does not require insurers to disclose specific reason(s) for taking adverse action, or to identify information from a consumer report that contributed to the action. Instead, it provides the consumer with the right to obtain a copy of all the information in his or her CRA files. From the required notice (item #4, above), consumers who suffer adverse action will know of their right to obtain that data without charge. However, should

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1. With respect to the underwriting of insurance, Section 603(k)(1)(B)(i) of the FCRA defines "adverse action" to mean "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

an insurer or other person wish to tell a consumer the reason(s) for the adverse action, nothing in the FCRA precludes that person from doing so.[2]

This is an informal staff opinion and is not binding on the Commission.

Sincerely,

Ronald G. Isaac

Attorney

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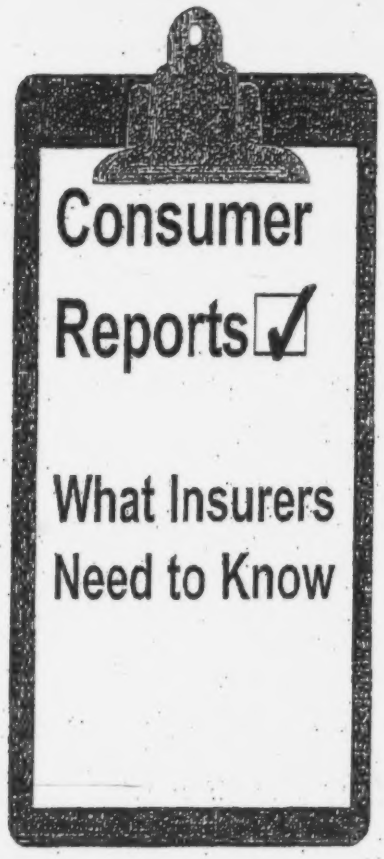
2. Section 607(c) forbids CRAs from prohibiting insurers or other consumer report users from providing consumers against whom they have taken adverse action with copies of their reports.

PPENDIX B — "FTC FACTS FOR BUSINESS: CONSUMER REPORTS – WHAT INSURERS NEED TO KNOW" (FTC OCTOBER 1998)

BEST AVAILABLE COPY

FTC FACTS for Business

BUSINESS
FEDERAL TRADE COMMISSION
1-877-FTC-HELP
FOR THE CONSUMER
www.ftc.gov



As an insurer, you may use consumer reports to underwrite insurance policies and to screen high-risk applicants — as long as you comply with the Fair Credit Reporting Act (FCRA).

The Act

The FCRA is designed to protect the privacy of consumer report information and to guarantee that the information supplied by credit reporting agencies (CRAs) is as accurate as possible. Consumer reports may include information on an applicant's credit history, medical conditions, driving record, criminal activity, and hazardous sports. Amendments to the FCRA, which went into effect September 30, 1997, increase the legal obligations of insurers who use consumer reports.

Appendix B

Non-compliance with the FCRA

There are legal consequences for insurers who fail to get an applicant's permission before requesting a consumer report or who fail to provide required disclosure notices. The FCRA allows individuals to sue insurers for damages in federal court. A person who successfully sues is entitled to recover court costs and reasonable legal fees. The law also allows individuals to seek punitive damages for deliberate violations. In addition, the Federal Trade Commission, other federal agencies, and the states may sue insurers for non-compliance and obtain civil penalties.

For More Information

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair business practices in the marketplace and to provide information to help consumers spot, stop, and avoid them. To file a complaint or to get free information on consumer issues, visit www.ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. The FTC enters Internet, telemarketing, identity theft, and other fraud-related complaints into Consumer Sentinel, a secure, online database available to hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.

Appendix B

The Adverse Action Notice

The following disclosure requirement applies to new applicants as well as current policy holders. When an adverse action is taken—such as a decision to deny insurance, increase rates, or terminate a policy—and it is based solely or partly on information in a consumer report, Section 615(a) of the FCRA requires you to provide a notice of the adverse action to the consumer. The notice must include:

- ✓ the name, address, and telephone number of the CRA that supplied the consumer report, including the toll-free telephone number for credit bureaus that maintain files nationwide;
- ✓ a statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give the specific reasons for it; and
- ✓ a notice of the individual's right to dispute the accuracy or completeness of any information the CRA furnished, and the consumer's right to a free report from the CRA upon request within 60 days.

Disclosure of this information is important because some consumer reports may contain errors. The adverse action notice is required even if information in the consumer report was not the main reason for the denial or rate increase. Even if the information in the report played only a small part in the overall decision, the applicant still must be notified.

While written adverse action notices are not required, many insurers provide them and keep copies for two years to show compliance with the FCRA.

Examples

The following examples illustrate situations where the adverse action notice must be given to insurance applicants.

A life insurance company orders a consumer report from a CRA, such as the Medical Information Bureau (MIB). Information contained in the MIB report leads to further investigation of the applicant. The application for insurance is rated or declined in whole or in part because of information obtained from the investigation.

Section 604(g) of the FCRA requires an insurance company, or any other user of medical information, to get the consumer's consent — orally, electronically, or in writing — before obtaining medical information. That means the life insurance company in this situation would have to get the consumer's consent before obtaining the consumer report from the MIB. In addition, since the MIB report formed part of the basis for the adverse decision in this case, the full Section 615(a) adverse action notice described above must be sent to the consumer.

A person with an unfavorable credit history, such as a bankruptcy, is denied automobile insurance at standard rates. Although the credit history was considered in the decision, the applicant's limited driving experience was even more important.

The applicant is entitled to the Section 615(a) adverse action notice because the credit report played a part, however minor, in the insurer's decision to charge a higher premium.